15-247 Field

Submitted
Jan. 4 1882

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 544.

AUGUSTUS H. BURLEY, ASSIGNEE IN BANKRUPTCY OF
DAVID KRIEGH, APPELLANT,

VS.

THOMPSON J. S. FLINT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE
NORTHERN DISTRICT OF ILLINOIS.

FILED AUGUST 26, 1880.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago in the district aforesaid, before the judges thereof, on Thursday, the eighth day of January, in the year of our Lord one thousand eight hundred and eighty, and of our Independence the one hundred and fourth year.

WILLIAM H. BRADLEY, *Clerk.*

AUGUSTUS H. BURLEY, ASSIGNEE IN BANKRUPTCY of David Kriegh,
v.
THOMPSON J. S. FLINT, DAVID KRIEGH, JANE E. Kriegh, his wife, James L. Flint, Frank B. Howell, and James W. Converse.
} In chancery.

NORTHERN DISTRICT OF ILLINOIS, *sct:*

Be it remembered that on the seventeenth day of October, A. D. 1879, came the said complainant, Augustus H. Burley, assignee, &c., by Clarence A. Burley, his solicitor, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs 2 and bill of review in said entitled cause which said bond for costs, and bill of review are respectively in the words and figures following, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1879.

A. H. BURLEY, ASSIGNEE IN B'K'CY OF DAVID Kreigh,
vs.
THOMPSON J. S. FLINT ET AL.
} In chancery.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the complainant of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him. Dated this seventeenth day of October, A. D. 1879.

CLARENCE A. BURLEY.

(Endorsed:) Filed Oct. 17th, A. D. 1879. Wm. H. Bradley, clerk.

Bill of review.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

3 In the circuit court of the United States, for the northern district of Illinois. In equity.

To the judges of the circuit court of the United States, for the northern district of Illinois, in chancery sitting:

Augustus H. Burley, of Chicago, in the county of Cook and State of

Illinois, in said district, and a citizen of the State of Illinois, assignee in bankruptcy of David Kriegh, bankrupt, brings this his bill of complaint against Thompson J. S. Flint, of Larchmont Manor, in the county of Westchester and State of New York, and a citizen of the State of New York; David Kriegh and Jane E. Kriegh, his wife, of Chicago, in the county of Cook and State of Illinois, and citizens of the State of Illinois; and James L. Flint, Frank B. Howell, and James W. Converse; and thereupon your orator complains and says:

That on the 31st day of March, A. D. 1877, Thompson J. S. Flint aforesaid exhibited his original bill of complaint in this honorable court against David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell, and James W. Converse, which said bill of complaint is as follows, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

4 In the circuit court of the United States for the northern district of Illinois.

Thompson J. S. Flint, of Larchmont Manor, in the county of Westchester and State of New York, and a citizen of the State of New York and resident therein, brings this his bill of complaint against David Kriegh and Jane E. Kriegh his wife, of the city of Chicago, in the county of Cook and State of Illinois, who are citizens of the State of Illinois and residents of said northern district thereof, and also against James L. Flint, Frank B. Howell, and James W. Converse.

And thereupon your orator complains and says that on the sixth day of August, in the year of our Lord one thousand eight hundred and seventy-two, the said defendant David Kriegh, being indebted unto your orator in the sum of forty-three thousand dollars ($43,000.00) and unto one Caroline K. Livingston in the further sum of seven thousand dollars ($7,000.00), made and delivered unto your orator his, said David Kriegh', certain promissory note of that date, for the said sum of forty-three thousand dollars, payable one year after its date to the order of your orator, with interest at the rate of ten per cent. per annum, payable semi-annually, and made and delivered unto the said Caroline K. Livingston his, said David Kriegh's, certain promissory note of the same date for the said sum of seven thousand dollars, payable 5 one year after its date to her order, with interest at the rate of ten per cent. per annum, payable semi-annually; and your orator attaches hereto as part of this bill of complaint a copy of the said promissory note so delivered to your orator as aforesaid marked Exhibit A, and will produce and prove the original upon the hearing of this cause as may be required.

And your orator further shows unto your honors that for the better securing the payment of the money mentioned in said two promissory notes with interest thereon, according to the tenor and effect of the said promissory notes above mentioned, the said David Kriegh and Jane E. Kriegh, his wife, on the said sixth day of August, A. D. 1872, granted, bargained, sold, and conveyed to your orator and said Caroline K. Livingston, their heirs and assigns forever, all of the undivided one-half of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen (19), twenty-five (25), and twenty-six (26), in the southwest quarter (¼) of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third principal meridian, in Cook County, Illi-

nois, to have and to hold the same together with all and singular
the tenements, hereditaments, privileges, and appurtenances there-
unto belonging or in any wise appertaining, and also all the estate,
interest, and claim whatsoever in law as well as in equity which
6 the said David Kriegh and Jane E. Kriegh, his wife, had in and
to the premises thereby conveyed as aforesaid to your orator and
said Caroline K. Livingston, their heirs and assigns, and to their only
proper use, benefit, and behoof, the said David Kriegh and Jane E.
Kriegh, his wife, thereby expressly waiving, releasing, relinquishing, and
conveying unto your orator and said Caroline K. Livingston, their heirs,
executors, administrators, and assigns, all right, title, claim, interest, and
benefit whatever in and to the above-described premises and each and
every part thereof which is given by or results from all laws of the
State of Illinois pertaining to the exemption of homesteads, subject,
however to a certain condition of defeasance in said conveyance con-
tained, to wit: That if the said David Kriegh and Jane E. Kriegh, their
heirs, executors, or administrators, should well and truly pay or cause
to be paid to your orator and said Caroline K. Livingston, their heirs,
executors, administrators, or assigns, the aforesaid sum of money
with such interest thereon, at the time and in the manner specified in
the above-mentioned notes according to the true intent and meaning
thereof, then and in that case, said conveyance and everything therein
expressed should be absolutely null and void, which said conveyance
duly executed and acknowledged by the said Daivid Kriegh and
7 Jane E. Kriegh, his wife, and delivered to your orator, and said
Caroline K. Livingston was filed for record in the recorder's
office of Cook County, Illinois, on the eleventh day of September, A.
D. 1872, and duly recorded in volume 26 of records, on page 545, and
a copy of which is hereto attached as a part of this bill of complaint,
marked Exhibit B, and the original whereof, or a duly certified copy
thereof from the records, will be produced and proved on the hearing
of this cause, as this honorable court may direct and require.

And your orator further shows unto your honors that the said promissory note to said Caroline K. Livingston, mentioned in and secured by said conveyance, has long since been fully paid, discharged, and cancelled, and has been surrendered so discharged and cancelled to said David Kriegh, wherefore said Caroline K. Livingston has no further remaining interest in said conveyance or in the indebtedness secured thereby or in the premises described therein.

But your orator further shows unto your honors that the said prom-
issory note for the sum of forty-three thousand dollars so payable to the
order of your orator as aforesaid has not yet been paid, nor has any
part of either the principal thereof or interest accrued thereon
8 from or since August 6th, A. D. 1876, been paid, although said
promissory note long since became due and payable, and the
same is still held and owned by your orator; by means whereof the
said mortgaged premises has become forfeited to your orator, subject
nevertheless to redemption in equity by the said David Kniegh and
Jane E. Kriegh, their heirs and assigns.

And your orator further shows unto your honors that, on the twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-five, the said defendant, David Kriegh, being indebted unto your orator in the further sum of seventeen thousand dollars ($17,000.00), made and delivered unto your orator, his, said David Kriegh's, certain other promissory note of that date, for the said sum of seventeen thousand dollars payable one year after its date to your orator or his order, with

interest at the rate of ten per cent. per annum from its date, payable semi-annually, as will more fully appear by reference to the said last-mentioned promissory note ready to be produced and proved as may be required, and whereof a copy is hereto attached as part of this bill of complaint, marked Exhibit C; and your orator further shows unto your honors that, for the better securing the payment of the money last aforesaid, with interest thereon according to the tenor and effect
9 of the said last-mentioned promissory note, the said David Kriegh and Jane E. Kriegh, his wife, on the said twentieth day of March, A. D. 1875, granted, bargained, sold, and conveyed unto your orator, his heirs and assigns forever, all the undivided one-half of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen (19), twenty-five (25), and twenty-six (26), in subdivision of the southwest quarter ($\frac{1}{4}$) of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third principal meridian (being the same premises described in and conveyed by the mortgage to your orator and said Caroline K. Livingstone hereinbefore first mentioned), also all the undivided one-half of the interest of the parties of the first part in said last-mentioned mortgage, namely, the said David Kriegh and Jane E. Kriegh, his wife, in the southwest quarter ($\frac{1}{4}$) of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third principal meridian situated in the city of Chicago, county of Cook, and State of Illinois, to have and to hold the same, together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any wise appertaining, and also all the estate, interest, and claim whatsoever in law as well as in equity, which the said David Kriegh and Jane E. Kriegh, his wife, had in and to the premises thereby conveyed, unto
10 your orator, his heirs and assigns, and to their only proper use, benefit, and behoof, the said David Kriegh and Jane E. Kriegh, his wife, thereby expressly waiving, releasing, relinquishing, and conveying unto your orator, his heirs, executors, administrators, and assigns, all right, title, claim, interest, and benefit whatever, in and to the premises described in said last-mentioned mortgage, and each and every part thereof, which is given by or results from all laws of the State of Illinois pertaining to the exemption of homesteads, subject, however, to a certain condition of defeasance in said last-mentioned conveyance contained, to wit, that if the said David Kriegh and Jane E. Kriegh, their heirs, executors, or administrators should well and truly pay or cause to be paid to your orator, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the last above-mentioned promissory note, according to the true intent and meaning thereof, then in that case said last-mentioned conveyance and everything therein expressed should be absolutely null and void; which said last-mentioned conveyance duly executed and acknowledged by the said David Kriegh and Jane E. Kriegh, his wife, and delivered to your orator, was filed for record in the recorder's office of Cook County, Illinois, on the sixth day
11 of May, A. D. 1875, and duly recorded in volume 372 of records, on page 481, and a copy of which is hereto attached as a part of this bill of complaint, marked Exhibit D, and the original whereof, or a duly certified copy thereof from the records, will be produced and proved on the hearing of this cause, as this honorable court may direct and require. And your orator further shows unto your honors that the said promissory note for the sum of seventeen thousand dollars, so payable to your orator or order as aforesaid, has not yet been paid, or has any part of either the principal thereof or interest accrued thereon

from or since the twentieth day of March, A. D. 1876, been paid, although said promissory note long since became due and payable, and the same is still held and owned by your orator; by means whereof the said premises mentioned in said mortgage last-above specified have become forfeited to your orator, subject, nevertheless, to redemption in equity by the said David Kriegh and Jane E. Kriegh, his wife, their heirs and assigns. And your orator further shows unto your honors that no proceedings at law have been had or taken to recover the indebtedness upon either of said notes so held by your orator as aforesaid, secured by said two mortgages, or any part thereof. And your orator further shows unto your honors that the said David Kriegh is
12 now wholly insolvent and unable to redeem the said premises from either of said two mortgages, and that the mortgaged property is meagre and scant security for the indebtedness accrued and now due and payable, secured by said two mortgages, and that the present value thereof is insufficient, as your orator verily believes to pay the amount so due, with the costs of this proceeding.

And your orator further shows unto your honors, that he has often demanded and requested payment from said David Kriegh of said indebtedness to your orator, but that said David Kriegh has neglected and refused, and still neglects and refuses to pay the same or any part thereof; wherefore your orator is constrained to seek the aid of this honorable court in the premises, where matters of such nature are properly relievable and cognizable.

And your orator further shows unto your honors, that the said defendants, James L. Flint, Frank B. Howell, and James W. Converse, as he is advised and believes, have, or claim to have some interest in the premises in said mortgage described, or some part or parts thereof, either as subsequent purchasers, incumbrancers, judgment creditors, or otherwise; but your orator charges the fact to be, that their interests and the interests of each of them, if they have any, in said premises, or any part thereof, have accrued subsequent to the lien of
13 each of the said two mortgages, and are subordinate thereto. Forasmuch therefore as your orator is without remedy in the premises except in a court of equity, and to the end that the said defendants may, if they can, show why your orator should not have the relief herein prayed, and may full, true, direct, and perfect answers make (but not under oath, their answers under oath being hereby expressly waived according to the statute in such cases made and provided) to all and singular the premises as fully and particularly as if the same were hereinafter repeated.

Your orator prays that an account may be taken under the direction of this court, of what is due and owing from said David Kriegh for principal and interest on the indebtedness to your orator, secured by said two mortgages, and the said defendant, David Kriegh, or such of the defendants as claim by, from, through, or under him, may be decreed to pay to your orator what may be found due to him on taking such account as aforesaid, together with the costs of this suit by a short day to be appointed by this honorable court for that purpose, or in default thereof, that the defendants and all persons claiming by, through, or under them, or any of them, may be absolutely and forever debarred and foreclosed of and from all right and equity of redemption in
14 or to the said premises described in said two mortgages, and every part thereof, and that the said David Kriegh may deliver up to your orator all deeds, papers, or writings in his custody or power relating to or concerning the said mortgaged premises, or any part thereof;

or, in the discretion of the court, that said premises in said two mortgages described be ordered sold by the master in chancery of this court under the direction of this honorable court, according to the rule and practice of the court, and that the master make and deliver a deed, or deeds, to the purchaser or purchasers at said sale, and that the proceeds of such sale so to be made may be applied to or towards the satisfaction of said indebtedness to your orator so as aforesaid secured by said two mortgages, and that, in the event of such sale being made, the said defendants, and each of them, and all persons claiming, or to claim by, from, through, or under them, or any of them, subsequent to the commencement of this suit, may be foreclosed and barred of and from all right, title, interest, claim, estate, or equity of redemption of, in, and to the said premises and every part and portion thereof, and that your orator may have such further and other or different relief in the premises as to your honors shall seem meet and the nature of his rights may require. May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, 15 to be directed to the said defendants, David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell, and James W. Converse, therein and thereby commanding them, and each of them, at a certain day and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand, to, perform, and abide such order and decree therein as to your honors shall seem meet.

And your orator will ever pray, &c.

THOMPSON J. S. FLINT,
By McCAGG, CULVER AND BUTLER,
His Solicitors.

McCagg, Culver and Butler,
Solicitors for Complainant.
E. B. McCagg,
Of Counsel.

Exhibit A.

$43,000.] Chicago, *August 6th*, 1872.

One year after date I promise to pay to the order of T. J. S. Flint, esq., forty-three thousand $\frac{00}{100}$ dollars, with interest at the rate of ten per cent. per annum, payable semi-annually.

Value received.

D. KRIEGH.

Exhibit B.

This indenture made the sixth day of August, in the year of 16 our Lord one thousand eight hundred and seventy-two, between David Kriegh and Jane E. Kriegh, his wife, of the city of Chicago, county of Cook, and State of Illinois, party of the first part, and Thompson J. S. Flint and Caroline K. Livingstone, of the city of New York and State of New York, party of the second part.

Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of fifty thousand dollars secured to be paid by two certain promissory notes of even date herewith made by said David Kriegh, one for the sum of forty-three thousand dollars-payable to the order of T. J. S. Flint, payable one year after date, with in, terest at the rate of ten per cent., payable semi-annually, and one for seven thousand dollars, payable to the order of Caroline K. Livingston, one year after date with interest at the rate of ten per cent. per annum, payable semi-annually.

Now, therefore, this indenture witnesseth that the said party of the first part for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said promissory notes above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and conveyed and by these presents does grant, bargain, sell, and convey unto
17 the said party of the second part, their heirs and assigns forever,
all of the undivided one-half of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen (19), twenty-five (25), and twenty-six (26) in the southwest quarter of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third principal meridian, in Cook County, Illinois.

[United States internal revenue stamps to the amount of fifty dollars ($50.00) are here attached to the original.]

To have and to hold the same together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging, or in any wise appertaining, and also all the estate, interest, and claim whatsoever in law, as well as in equity, which the party of the first part have in and to the premises hereby conveyed unto the said party of the second part, their heirs and assigns, and to their only proper use, benefit, and behoof, and the said party of the first part hereby expressly waive, release, relinquish, and convey unto the said party of the second part, their heirs, executors, administrators, and assigns all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each and every part thereof, which is given by or results from, all laws of this State pertaining to the exemption of homesteads.

Provided always, and these presents are upon this express con-
18 dition, that if the said party of the first part, their heirs, execu-
tors, or administrators shall well and truly pay, or cause to be paid, to the said party of the second part, their heirs, executors, administrators, or assigns the aforesaid sum of money, with such interest thereon at the time and in the manner specified in the above-mentioned notes according to the true intent and meaning thereof, then, in that case, these presents, and everything herein expressed, shall be absolutely null and void.

It witness whereof the said party of the first part hereunto set our hands and seals the day and year first above written.

DAVID KRIEGH. [SEAL.]
JANE E. KRIEGH. [SEAL.]

Signed, sealed, and delivered in presence of—

STATE OF ILLINOIS,
Cook County, City of Chicago, ss:

I, John Forsythe, a notary public in and for the city of Chicago, in said county, in the State aforesaid, do hereby certify that David Kriegh and Jane E. Kriegh, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing mortgage, appeared before me this day in person and acknowledged that they
19 signed, sealed, and delivered the said instrument of writing as

their free and voluntary act, for the uses and purposes therein set forth; and the said Jane E. Kriegh, having been by me examined separate and apart, and out of the hearing of her husband, and the contents and meaning of said instrument of writing having been by me made known and fully explained to her, and she also by me being fully informed of her rights under the homestead laws of this State, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements herein mentioned; and also all her rights and advantages under and by virtue of all laws of this State relating to the exemption of homesteads voluntarily and freely, and without the compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and notarial seal this eleventh day of September, A. D. 1872.

JOHN FORSYTHE,
NOTARY PUBLIC,
CHICAGO, ILL.

JOHN FORSYTHE,
Notary Public.

Mortgage. D. Kriegh to T. J. S. Flint. No. 55329.

STATE OF ILLINOIS,
Cook County, ss:

20 I, Norman T. Gassette, clerk of the circuit court, and ex-officio recorder within and for the county of Cook and State aforesaid, do hereby certify that the within and foregoing instrument of writing was filed for record on the 11th day of Sept., A. D. 1872, at o'clock, m., and duly recorded in volume 26 of records, on page 545.

In testimony whereof I have hereunto set my hand.

N. T. GASSETTE.

EXHIBIT C.

$17,000.] CHICAGO, *March 20th*, 1875.

One year after date I promise to pay to T. J. S. Flint, or order, seventeen thousand dollars, for value received, with interest at the rate of ten per cent. per annum from date, interest payable semi-annually.

D. KRIEGH.

EXHIBIT D.

This indenture, made this twentieth day of March, in the year of our Lord one thousand eight hundred and seventy-five, between David Kriegh and Jane E. Kriegh, his wife, of the city of Chicago, county of Cook and State of Illinois, party of the first part, and Thompson J. S. Flint, of the city of New York and State of New York, party of the second part.

21 Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of seventeen thousand dollars, secured to be paid by a certain promissory note of said David Kriegh of even date herewith for the said sum of seventeen thousand (17,000) dollars, payable one year after date, with interest at the rate of ten per annum from date, interest payable semi-annually.

Now therefore this indenture witnesseth, that the said party of the first part for the better securing the payment of the money aforesaid, with interest thereon according to the tenor and effect of the said promissory note above mentioned, and also in consideration of the further sum of one dollar to them in hand paid by the said party of the second part at the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, all the undivided one-half of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen (19), twenty-five (25), and twenty-six (26) in subdivision of the southwest quarter of section (12), township thirty.nine (39), range thirteen (13) east of the third principal meridian, situated in the city of Chicago, county of Cook and State of Illinois.

To have and to hold the same, together with all and singular the tenements hereditaments, privileges, and appurtenances there-
22 unto belonging or in any wise appertaining, and also all the estate, interest, and claim whatsoever, in law as well as in equity, which the party of the first part has in and to the premises, hereby conveyed unto the said party of the second part, his heirs and assigns and to their only proper use, benefit, and behoof, and the said David Kriegh and Jane E. Kreigh, his wife, party of the first part hereby expressly waive, release, relinquish and convey unto the said party of the second part, his heirs, executors, administrators, and assigns all right, title, claim, interest, and benefit whatever in and to the above-described premises, and each and every part thereof which is given by or results from all laws of this State pertaining to the exemption of homesteads; provided always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, or administrators, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money with such interest thereon at the time and in the manner specified in the above-mentioned promissory note according to the true intent and meaning thereof then in that case these presents and everything herein expressed shall be absolutely null and void.

In witness whereof the said party of the first hereunto set their hands and seals the day and year first above written.

DAVID KRIEGH. [SEAL.]
JANE E. KRIEGH. [SEAL.]

Signed, sealed and delivered in presence of—

23 STATE OF ILLINOIS,
Cook County, ss:

I, Samuel T. Atwater, a notary public in and for the said county, in the State aforesaid, do hereby certify that David Kriegh and Jane E. Kriegh , are personally known to me as the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and official seal, this first day of April, A. D. 1875.

{ SAM'L T. ATWATER,
NOTARY PUBLIC,
CHICAGO, ILLS. }

SAM'L T. ATWATER,
Notary Public.

Mortgage. D. Kriegh to T. J. S. Flint. No. 27099.

STATE OF ILLINOIS,
Cook County, ss:

I, James Stewart, recorder within and for the county and State aforesaid do hereby certify that the within and foregoing instrument of writing was filed for record on the 6 day of May, A. D. 1875, at 3 o'clock p. m. and duly recorded in volume 372 of records on page 481.

In testimony whereof I have hereunto set my hand the day and
24 date aforesaid.

JAS. STEWART,
Recorder.

(Endorsed:) Filed M'ch 31, 1877. Wm. H. Bradley.

And your orator further shows that afterwards on, to wit, the 9th day of June, A. D. 1877, your orator appeared before this honorable court, and, on motion of his solicitor, obtained leave of the court to become a party defendant to said cause, and that thereafter and in accordance with said leave, your orator appeared therein and put in his answer to said bill of complaint as follows, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court, northern district of Illinois.

THOMPSON J. S. FLINT
vs.
DAVID KRIEGH, JANE E. KRIEGH, JAMES L. Flint, Frank B. Howell, and James W. Converse.
} In chancery.

The answer of A. H. Burley, assignee in bankruptcy of David Kriegh and Charles W. Kriegh, bankrupts, made a party defendant, on his own motion, to the bill of complaint of Thompson J. S. Flint, complainant.

This defendant, reserving to himself all right of exception to the said bill of complaint, for answer thereto, says:

25 That he has been informed, and believes it to be true, that David Kriegh was indebted to said complainant in a large sum of money, to wit, the sum of forty-three thousand dollars ($43,000), for which sum said David Kriegh gave his promissory note bearing date August 6th, 1872, for such amount payable in one year after date, with interest at the rate of ten per centum per annum, and that to secure the payment of said note said David Kriegh and Jane E. Kriegh, his wife, did on the same day, the 6th of August, 1872, as aforesaid, execute their certain mortgage deed, in and by which they conveyed to said complainant the following described property, viz:

The undivided one half ($\frac{1}{2}$) of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen (19), twenty-five (25), twenty-six (26), in the southwest quarter ($\frac{1}{4}$) of section twelve (12), township thirty-nine (39), range thirteen (13) east, of the third (3rd) principal meridian, in Cook County, Illinois, subject, nevertheless, to a defeasance on the payment of the said note and interest, as set forth in said complainant's bill of complaint.

And this defendant, further answering, says that it may be true for anything this defendant knows to the contrary, that said David Kriegh was also at that time indebted to Caroline K. Livingstone in the sum of seven thousand dollars ($7,000), and that he gave his note therefor,

the payment of which note was also secured by the same mort-
26 gage-deed aforesaid, and that said note for seven thousand dol-
lars ($7,000) was subsequently paid, but this defendant is ignorant of all such matters, and can form no belief concerning the same.

And this defendant, further answering, says that he has been informed and believes it to be true, that said David Kriegh was subsequently indebted to said complainant in a large sum of money, to wit, the sum of seventeen thousand dollars ($17,000), for which sum he gave his promissory note bearing date March 20th, 1875, payable one year after date, with interest at the rate of ten per centum per annum, and that to secure the payment of the said promissory note, the said David Kriegh and Jane E. Kriegh, his wife, did execute their certain other mortgage deed bearing date the same day, the 20th of March, 1875, as aforesaid, in and by which they conveyed to the said complainant their interest in the same property conveyed in the aforementioned mortgage deed bearing date the 6th of August, 1872. But this defendant denies that he has any information or knowledge and is unable to form any opinion or belief of or concerning any other undivided half-interest in the southwest quarter of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third (3rd) principal meridian, as set forth generally in the complainant's bill of complaint, and the supposed
27 copy of this said second mortgage, thereto attached as Exhibit D,
and puts said complainant to proof of such interest, if any there be.

And this defendant, further answering, states that on the 2nd day of April, A. D. 1877, the said David Kriegh and one Charles W. Kriegh, previously doing business under the firm-name of D. Kriegh & Co., were put into bankruptcy on the petition of their creditors, and were thereafter adjudicated to be bankrupts, and that on the 21st day of April, this defendant was elected assignee of said bankrupts and was thereafter duly confirmed and entered upon the duties of said office.

And he further states that as such assignee, he holds the equity of redemption of the property described in said mortgages for the benefit of the creditors; that such equity is of considerable value, and that if these mortgages be foreclosed he will be unable to realize anything from said equity for the benefit of such creditors.

This defendant therefore prays that as such assignee as aforesaid, he be allowed a reasonable time in which to sell and realize from or upon said equity; and that if the complainant claims or there be any interest covered or included in said mortgage deed last mentioned, bearing date the 20th of March, 1875, under the description "also all the undivided one-half of the interest of the parties of the first part in the south-
28 west quarter (¼) of section twelve (12), township thirty-nine (39),
range thirteen (13) east of the third (3rd) principal meridian," which is not included in the more particular description in the preceding part of said last mentioned mortgage deed, that such interest be fully set forth by the said complainant, and that this defendant be given an accurate description of the same, and that he be allowed such reasonable time to dispose thereof as may be granted in the case of the other equity, and that all proceedings of foreclosure may be stayed until this defendant has had a reasonable time in which to try to sell such equities, and for such other and further relief as to this honorable court may seem meet.

A. H. BURLEY, *Assignee.*

JOSIAH GRANT and
CLARENCE A. BURLEY,
Solicitors for Defendant A. H. Burley, Assignee.

And your orator further shows that the other defendants entered their appearances in the said cause, and that the said Thompson J. S. Flint filed his replication to the answer of your orator above set out; and issue having been joined and the said cause having been referred to Henry W. Bishop, master in chancery, to take proof therein, and witnesses having been examined and proofs closed, and the report of master aforesaid having been returned into court, the said cause was brought to a hearing in this honorable court, and a decree was
29 rendered thereby on the nineteenth day of October, A. D. 1877,
in and by which it was ordered, adjudged, and decreed as follows, to wit:

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois.

FRIDAY, *October 19th, A. D.* 1877.

Present, Hon. Henry W. Blodgett, district judge.

THOMPSON J. S. FLINT
vs.
DAVID KRIEGH, JANE E. KRIEGH, JAMES L. Flint, Frank B. Howell, James W. Converse, and Augustus H. Burley, assignee in bankruptcy of David Kriegh. } In chancery.

This cause having this day been brought on to be heard upon the bill of complaint filed herein, taken as confessed by the defendants, David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell, and James W. Converse, and upon the answer of Augustus H. Burley, assignee in bankruptcy of David Kriegh, and complainant's replication thereto, and upon the report of Henry W. Bishop, master in chancery of this court, which report bears date the twenty fifth day of July, A. D. 1877, and was made in pursuance of an order of this court heretofore made in this cause referring it to the said master to take the proofs in said
30 cause, and to compute the amount due to the complainant upon
the mortgages and the notes and the covenants therein contained, mentioned, and set forth in said bill of complaint, and which report was filed herein on the thirtieth day of July, A. D. 1877:

On reading said report, upon motion of counsel for the complainant no cause to the contrary having been shown: It is ordered, adjudged, and decreed, and this court, by virtue of the authority in it vested, doth order, adjudge, and decree that the said report and all things therein contained do stand ratified and confirmed, and the rule heretofore entered in this cause in that behalf is hereby made absolute.

And this court being fully advised in the premises, doth find and adjudge that all the material allegations in the said bill of complaint contained have been fully proved, and that the equities herein are with the complainant, and that there is due to the complainant in this cause from the said defendant, David Kriegh, the sum of sixty-six thousand four hundred and fifty-eight dollars and eighty-seven cents and interest thereon from the twenty-fifth day of July, A. D. 1877, the date of said master's report.

It is therefore, upon motion of counsel for the complainant, ordered,

adjudged, and decreed, and this court, by virtue of the power and authority in it vested, doth order, adjudge, and decree that the said defendant, David Kriegh, or some of the other defendants in this cause,
31 pay or cause to be paid to the complainant within one hundred days from the date of the entry of this decree the said sum of sixty-six thousand four hundred and fifty-eight dollars and eighty-seven cents, with interest thereon at the rate of six per centum per annum from the said twenty-fifth day of July, A. D. 1877 (being the date of said master's report), to the day of such payment; and also pay into court the costs in this cause taxed; and in default of so doing, that all and singular the premises mentioned and described in the said bill of complaint and hereinafter described, or so much thereof as may be sufficient to satisfy the amount due to the complainant as hereinbefore adjudged, together with interest and the costs in this case, and which may be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the said Henry W. Bishop, the master in chancery of this court, at the front door (on La Salle street) of the Republic Life building, numbers 157 to 163, La Salle street, Chicago, Cook County, Illinois, and that said master make such sale in accordance with the course and practice of this court, and that at such sale the complainant or any of the parties to this cause may become the purchaser.

The premises authorized to be sold under and by virtue of this decree are the following, to wit: All of the undivided one-half of lots or blocks four (4), five (5), ten (10), eleven (11), eighteen (18), nineteen,
32 (19), twenty-five (25), and twenty-six (26), in the southwest quarter of section twelve (12), township thirty-nine (39), range thirteen (13) east of the third principal meridian, in Cook County, Illinois; also all the undivided one-half of the interest of the said David Kriegh and Jane E. Kreigh, in the southwest quarter of section twelve (12), township thirty-nine (39), range thirteen (13) east of the said principal meridian, situate in the city of Chicago, county of Cook, and State of Illinois, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging.

It is further ordered, that if the said premises, or any part thereof, shall at such sale be struck off and sold by the master to the complainant in this cause the complainant shall be required to pay in money to the master only so much of the complainant's bid as shall, taken together with other moneys paid to the master at such sale on bids for parcels by other persons, if any there be, be sufficient to satisfy the expenses of the sale and the master's fees, disbursements, and expenses, and the costs of this suit, and also any excess of the remainder of the amount of said bid after such payment over the amount due the complainant under this decree for indebtedness secured by said mortgage.

It is further ordered that said master make report to this court
33 of such sale and of his acts and doings hereunder for approval and confirmation and for further direction herein, and that he retain from the moneys received by him on said sale the amount of his fees, disbursements, and commissions thereon, and bring the residue of such moneys, if any, into court to abide the further order of the court, and that he take the receipt of the clerk of this court therefor and file the same with said report; and if the price for which said premises shall be so sold shall be insufficient to satisfy the amount so found and adjudged to be due to the complainant with the interest thereon and the costs of suit and expenses of sale as aforesaid, that the

said master specify the amount of such deficiency in his said report of sale.

And it is further ordered that the clerk of this court hold such moneys so to be paid him by said master subject to the further order and directions of this court in this cause.

And further your orator shows that in accordance with said order or decree, the said Henry W. Bishop, master in chancery, made a sale of the property aforesaid, and thereafter made a report of said sale, which said report shows that said property was bought or bid in by the mortgagee in the mortgages aforesaid, to wit, Thompson J. S. Flint, the complainant in said original bill for much less than the amount of the
34 mortgage debts, and interest, and thereupon this honorable court
entered another order or decree on, to wit, the 13th day of March, A. D. 1878, as follows, to wit:

United States circuit court, northern district of Illinois.

WEDNESDAY, *March 13th*, A. D. 1878.

Present, Hon. Henry W. Blodgett, district judge.

THOMPSON J. S. FLINT
vs.
DAVID KRIEGH, JANE E. KRIEGH, JAMES L. Flint, Frank B. Howell, James W. Converse, and Augustus H. Burley, assignee in bankruptcy of David Kriegh.
} In chancery.

And now again comes the complainant, by his solicitors, Messrs. McCagg, Culver, and Butler, and upon his motion, no cause to the contrary having been shown, it is ordered that the report of Henry W. Bishop, master in chancery of this court, of the sale, and the sale, of the premises described in the decree entered in this cause on the nineteenth day of October, A. D. 1877, and which said report was filed herein on the ninth day of March, A. D. 1878, be and the same are hereby approved, ratified, and absolutely confirmed; and it is further ordered, adjudged, and decreed by the court that the said master execute and deliver to Thompson J. S. Flint, the purchaser named
35 in said report of sale, a deed conveying the said premises and
all right and title, legal or equitable, of said defendants therein, so by said master sold to him, as in said report mentioned; and it is further ordered, adjudged, and decreed that the said defendants, and all persons claiming or to claim from, through, or under them from and after the commencement of this suit, and all persons having a lien subsequent to the mortgage mentioned in the bill of complaint in this cause, either by judgment or decree, or otherwise, upon the premises described in said mortgage, and his and their heirs and personal representatives, and all persons having any lien or claim by, from, or through, or under such subsequent judgment or decree, and their heirs and personal representatives, and all persons claiming under them, be forever barred and foreclosed of and from all equity of redemption and other claims, legal or equitable, of, in, and to the said premises, and every part and parcel thereof.

And it is further ordered that the said purchaser of said premises be let into possession thereof, and that any of the parties to this suit who may be in possession of said premises, or any part thereof, and any person or persons who since the commencement of this suit have come

into possession under them or either of them, deliver possession
36 thereof to said purchaser on production of the master's deed for said premises, and a copy of this order confirming said sale; and it appearing to the court from said report that the said master has, as required by said decree, paid into court and taken the receipt of W. H. Bradley, esq., clerk, therefor, and filed the same with his report, the sum of seventy-six dollars and forty-eight cents ($76.48), being the amount of the taxed costs in said cause; and that after deducting the same, together with the master's fees, commissions, and disbursements, there remains to be applied upon the amount due to said complainant under said decree the sum of thirty-eight thousand nine hundred and nineteen dollars and thirty-two cents ($38,919.32):

It is ordered that said clerk credit said last-mentioned sum on said decree as paid to said complainant on said twenty-third day of February, A. D. 1878, the date of said master's report of sale as aforesaid. And it further appearing to the court from said report that the proceeds of said sale were insufficient to pay the amount found and adjudged to be due to the complainant herein, and that the deficiency thereof amounts to the sum of twenty-nine thousand eight hundred and forty-three dollars and forty-five cents ($29,843.45): Now, therefore, it is ordered, adjudged, and decreed by the court that the
37 said complainant have and recover of and from the defendant, David Kriegh, who is personally liable for the payment of said debt, a judgment herein for the said last-mentioned sum of twenty-nine thousand eight hundred and forty-three dollars and forty-five cents ($29,843.45), to be proved up for that amount in the matter of the estate of said David Kriegh, in bankruptcy.

And your orator further shows that thereafter your orator appeared in court and entered a motion to vacate said order of confirmation for the reason of the inadequacy of the price paid for the said land by the complainant, which motion appears as follows, to wit:

United States circuit court, northern district of Illinois.

MONDAY, *March 25th, A. D.* 1878.

Present, Hon. Henry W. Blodgett, district judge.

THOMPSON J. S. FLINT
vs. } In chancery.
DAVID KRIEGH ET AL.

Now come the parties by their solicitors, and the defendant's solicitor moves the court to vacate the order confirming the sale by the master heretofore entered herein, and thereupon ten days' time is given said defendants to file affidavits in support of said motion.

And further your orator shows that thereafter a further order
38 was entered by this honorable court on the 23d day of April, A. D. 1878, overruling the said motion of your orator, and confirming, ratifying, and approving the order or decree of March 13th, 1878, aforesaid as follows, to wit:

United States circuit court, northern district of Illinois.

TUESDAY, *April 23d, A. D.* 1878.

Present, Hon. Henry W. Blodgett, district judge.

THOMPSON, J. S. FLINT
vs.
DAVID KRIEGH, JANE E. KRIEGH, JAMES L. Flint, Frank B. Howell, James W. Converse, and Augustus H. Burley, assignee in bankruptcy of David Kriegh. } In chancery.

Now again comes the said complainant, by his solicitors, and it appearing to the court that no affidavits have been filed herein in support of the defendant's motion to vacate the order entered herein on the thirteenth day of March, A. D. 1878, confirming the sale and report of sale herein, and that the time within which such affidavits were allowed to be filed has elapsed: It is ordered by the court that said motion made on behalf of said defendants be, and the same is hereby, overruled, and thereupon the said order of this court entered herein on the said thirteenth
day of March, A. D. 1878, and the master's report of sale and the sale
39 therein referred to are in all things absolutely and forever ratified, approved, and confirmed.

And your orator further saith that at the time of the entry of said decree of foreclosure, and for some years prior thereto said David Kriegh and said Thompson J. S. Flint were owners in common, each owning one undivided half of the tract of land described in said mortgage, and that mortgage was intended to convey and did convey, according to the terms thereof, the half interest in said tract so owned by said Kriegh. That a the time of the entry of said decree, one John Brems was in possession of said premises as the tenant of said Flint and said Kriegh, as owners thereof as aforesaid, and that since said sale under said decree was made as aforesaid, said Brems has continued in possession of said premises, and prior to the filing of this bill of review said Brems has accounted for the rent of said premises to one Newbury as agent of said Flint. Wherefore your orator saith and charges the fact to be that said Flint has, since said sale under said decree, by his tenant and agent in that behalf, assumed and entered upon the possession of said mortgaged premises. And your orator saith that he believes the fact to be that the said deed of said master ordered by the decrees aforesaid was made and executed by said master on, to wit, the
11th day of May, A. D. 1878; that said deed remained in the
40 hands of said master until on or about the 9th day of October,
A. D. 1879, when the same was delivered to or for the said Thompson J. S. Flint and then and there placed on record.

And your orator shows that the said decrees and orders are erroneous and ought to be reviewed, reversed, and set aside for many errors and imperfections therein apparent.

Inasmuch as the order or decree of October 19th, 1877, orders the absolute sale of the property aforesaid without providing for or giving time for redemption, contrary to the statute made and provided concerning sales of real estate in Illinois under and by virtue of executions or decrees of court.

And inasmuch as the order or decree of March 13th, 1878, aforesaid, and the order of April 23d, 1878, aforesaid, confirming, ratifying, and

approving the said order of March 13th, 1878, make no provision or allowance for the redemption of the said land from the sale thereof by the master as aforesaid, and further order and decree the master to make an absolute deed of the said land or property to the purchaser, Thompson J. S. Flint; and further order and decree that your orator and all parties shall be forever foreclosed and barred from any and all claim or title, and equity of redemption in or to said land or property, contrary to law and to the statute made and provided for the sale and redemption of real estate in the State of Illinois, under and by
41 virtue of judgments, executions, and decrees of court.

And your orator further saith that the said decrees and orders are further erroneous and ought to be reviewed, reversed, modified, and set aside, in so far as the same progress to bar or prohibit your orator, as assignee as aforesaid, from redeeming the said premises from said sale, contrary to the statutes of the State of Illinois in that behalf.

For all which manifest errors and imperfections in the said orders and decrees appearing upon the face thereof, your orator brings this his bill of review to be relieved in the premises.

And forasmuch as your orator is without remedy in the premises except here in this court in equity, therefore prays he that the said Thompson J. S. Flint, David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell, and James W. Converse, who are made parties defendant to this bill may be required to make full and direct answer to the same, but not under oath, the oaths of each and all of said defendants being hereby expressly waived.

That said orders and decrees may be reviewed, reversed, modified, or set aside, so far as the same purport to bar or foreclose your orator and all other parties from their claim or right of equity of redemption in and to the said land or property, contrary to law and to the said statute made and provided in that behalf as aforesaid, and so
42 far as may be necessary to that end that all proceedings already had or taken under the said decrees, may be avoided and set aside, and that any and all deeds made or possession taken under or by virtue of said decrees or orders may be set aside, annulled, and held void so far as may be necessary to the restoring to your orator, and to all other persons of his and their right and equity of redemption in or to the said property; and to the end that your orator may, so far as may be necessary in that behalf, be put in his first and former position as to the said property, so far as may be necessary to the preservation and continuance for the time allowed by law of his said right and equity of redemption after the same shall be restored to him and others, and that this honorable court may adjudge and decree to him and all other persons the said right and equity of redemption, and that he may have and enjoy the same freely and without obstruction, pursuant to law and to the statutes of the State of Illinois made and provided. And that your orator may have such other further or different relief in the premises as may be agreeable to the rules and practice of this honorable court in such cases:

May it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to the said defendants Thompson J. S. Flint, David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell, and James W. Converse, therein and thereby commanding them and each of them, at a
43 certain day and under a certain pain therein to be specified,

personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to, perform, and abide such order and decree therein as to your honors shall seem meet.

And your orator will ever pray, &c.

AUGUSTUS H. BURLEY,
Assignee in Bankruptcy of David Kriegh, Bankrupt.
By CLARENCE A. BURLEY,
His Solicitor.

CLARENCE A. BURLEY,
Solicitor for Complainant.

(Endorsed:) Filed Oct. 17, 1879. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 17th day of October, A. D. 1879, a writ of subpœna issued out of said clerk's office to said defendants in said entitled cause, which said writ with the return of the marshal endorsed thereon, is in the words and figures, to wit:

Writ of subpœna.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

The United States of America to Thompson J. S. Flint. David Kriegh and Jane E. Kriegh, his wife, James L. Flint, Frank B. Howell, and James W. Converse, greeting:

44 We command you and every of you that you appear before our judges of our circuit court of the United States of America for the northern district of Illinois, at Chicago, in said district, on the first Monday in the month of December next, to answer the bill of review of Augustus H. Burley, assignee in bankruptcy of David Kriegh, bankrupt, this day filed in the clerk's office of said court in said city of Chicago then and there to receive and abide by such judgment and decree as shall then or thereafter be made upon pain of judgment being pronounced against you by default.

To the marshal of the northern district of Illinois, to execute.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 17th day of October, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the 104th.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Memorandum.

The above-named defendants are notified that unless they and each of them shall enter their appearance in the clerk's office of said court, at Chicago, aforesaid, on or before the day to which the above writ is returnable, the complainant's bill will be taken against them as
45 confessed and a decree entered accordingly.

WM. H. BRADLEY, *Clerk.*

I have served the within writ within my district in the following manner, to wit: Upon James W. Converse, therein named, on the 23 day of October, A. D. 1879, by personally delivering to him a true copy of the same on the aforesaid day. I also served the same upon the following-named defendants, not having been able to find them to serve personally, by leaving a true copy for each of them at their usual place of abode with an adult person and a member of their respective family, to wit: Upon David Kriegh, on the 23d day of October, A. D. 1879, with Annie Erssler, also upon Jane E. Kriegh, on the 23' day of October, A. D. 1879, with Annie Erssler. I did not serve the other defendants, having been unable to find either them or that they had any residence within my district.

J. S. HILDRUP,
U. S. Marshal.
By J. STILLWELL, *Deputy.*

(Endorsed:) Filed Oct. 30th, A. D. 1879. William H. Bradley, clerk.

Afterwards, to wit, on the 7th day of November, A. D. 1879, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

46 AUGUSTUS H. BURLEY, ASSIGNEE IN bankruptcy of David Kriegh, a bankrupt,
v.
THOMPSON J. S. FLINT ET AL.
} In chancery.

Now comes the said defendant Thompson J. S. Flint, by McCagg, Culver and Butler, his solicitors, and enters a qualified and limited appearance herein, and files his motion to dismiss and strike said bill of review from the files; which said notice, counsel for said complainant being present, is submitted to the court and taken under advisement.

Afterwards, to wit, on the 8th day of January, A. D. 1880, said complainant, by his solicitor, filed in said clerk's office his amendments to the bill of review in said entitled cause; which said amendments are in the words and figures following, to wit:

Amendments to bill of complaint.

Circuit court of the United States, northern district of Illinois. In chancery.

AUGUSTUS H. BURLEY, ASSIGNEE, ETC.,
vs.
THOMPSON J. S. FLINT ET ALS.
} Bill of review.

Amendments to the bill proposed by the complainant which he asks leave to file under equity rule No. 28.

47 I. On page 40, after the words "approved and confirmed," and before the words "and your orator says that the said decrees and orders are erroneous, &c.," on page 41, insert the following:

And your orator further saith that at the time of the entry of said decree of foreclosure and for some years prior thereto, said David Kriegh and said Thompson J. S. Flint were owners in common, each owning one undivided half of the tract of land described in said mortgage, and that said mortgage was intended to convey and did convey according to the terms thereof, the half interest in said tract so owned by said Kriegh; that at the time of the entry of said decree one John Brems was in possession of said premises as the tenant of said Flint and said Kriegh as owners thereof as aforesaid; and that since said sale under said decree was made as aforesaid, said Brems has continued in possession of said premises, and prior to the filing of this bill of review said Brems has accounted for the rent of said premises to one Newbury, as agent of said Flint.

Wherefore your orator saith and charges the fact to be that said Flint has, since said sale under said decree, by his tenant and agent in that behalf, assumed and entered upon the possession of said mortgaged premises; and your orator saith that he believes the fact
48 to be that the said deed of said master, ordered by the decrees
aforesaid, was made and executed by said master on, to wit, the 11th day of May, A. D. 1878; that said deed remained in the hands of said master until on or about the 9th day of October, A. D. 1879, when the same was delivered to or for the said Thompson J. S. Flint, and then and there placed on record.

II. On page 41 of the said bill of review, after the words, "and decrees of court," and next before the words, "for all which manifest errors and imperfections," insert the following:

And your orator further saith that the said decrees and orders are further erroneous and ought to be reviewed, reversed, modified, and set aside in so far as the same profess to bar or prohibit your orator as assignee as aforesaid, from redeeming the said premises from said sale contrary to the statutes of the State of Illinois in that behalf.

III. In the prayer of the said bill on page 42 after the words, "the oaths of each and all of said defendants being hereby expressly waived," strike out the remainder of the said prayer, down to the prayer for process, and insert in lieu thereof the following:

That said orders and decrees may be reviewed, reversed, modified, or set aside, so far as the same purport to bar or foreclose your orator and all other parties from their claim or right of equity of redemp-
49 tion in and to the said land or property contrary to law and to
the said statute made and provided in that behalf as aforesaid, and so far as may be necessary to that end, that all proceedings already had or taken under the said decrees may be avoided and set aside, and that any and all deeds made, or possession taken under or by virtue of said decrees or orders may be set aside, annulled, and held void so far as may be necessary to the restoring to your orator and to all other persons of his and their right and equity of redemption in or to the said property, and to that end that your orator may, so far as may be necessary in that behalf, be put in his first and former position as to the said property, so far as may be necessary to the preservation and continuance for the time allowed by law, of his said right and equity of redemption after the same shall be restored to him and others, and that this honorable court may adjudge and decree to him and all other persons the said right and equity of redemption and that he may have and enjoy the same freely and without obstruction, pursuant to law and to the statutes of the State of Illinois, made and provided. And that your orator may have such other, further, or different relief in

the premises as may be agreeable to the rules and practice of this honorable court in such cases.

AUGUSTUS H. BURLEY,
Assignee in Bankruptcy of David Kriegh, Bankrupt.
By CLARENCE A. BURLEY,
His Solicitor.

CLARENCE A. BURLEY,
Solicitor for Complainant.

50 (Endorsed:) Filed Jan. 8, '80. Wm. H. Bradley, c'lk.

And on the same day, to wit, the 8th day of January, A. D. 1880, in the record of the proceedings of said court in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS H. BURLEY, ASSIGNEE, &C.
vs.
THOMPSON J. S. FLINT ET AL.
} In chancery. Bill of review.

Now again come the respective parties, by their counsel, and the court having considered of the motion of said Thompson J. S. Flint, to dismiss the said bill of review (which motion, by request of complainant, has been treated as both a motion and a demurrer for the purpose of enabling the court to consider and pass upon the equities of the bill of complaint), and having heard the arguments of counsel thereon, and being now fully advised in the premises: It is ordered by the court that the said bill of review be dismissed as against the said defendant, Thompson J. S. Flint.

And thereupon, the complainant by counsel asks leave of the court to amend his said bill of review and presents to the court the amendments he desires to make, to the filing of which amendments the said Flint, by his counsel objects, but the court overrules the objection of said Flint and grants leave to complainant to file said amendments to his said bill of complaint instanter, and insert them in the bill, which is done accordingly, said Flint by his counsel duly excepting thereto and to the granting of such leave by the court. 51

And thereupon the said Thompson J. S. Flint, by his counsel, renews his qualified appearance to said bill of complaint as amended, and renews his motion to dismiss the same, which motion it is agreed may be treated by the court either as a motion or a demurrer, for the purpose of enabling the court to pass upon the said bill of review as so amended; and the court being fully advised in the premises, doth order, adjudge, and decree that the said bill of review, as so amended be, and the same is hereby, dismissed out of this court as against the said defendant, Thompson J. S. Flint; from which order and decree of the court so dismissing the said bill of review as amended, the said complainant therein doth pray an appeal to the Supreme Court of the United States, which appeal is allowed upon the said complainant filing herein within thirty days from this date his appeal bond in the penalty of one thousand dollars, conditioned in the usual form and with surety or sureties to be approved by the court.

Afterwards, to wit, on the 23d of January, A. D. 1880, in the record of the proceedings of said court in said entitled cause, before the honorable Henry W. Blodgett, district judge, is the following entry to wit: 52

AUGUSTUS H. BURLEY, ASSIGNEE, &C.,
v.
THOMPSON J. S. FLINT ET AL.
} In chancecy.

Now comes the complainant and files an appeal bond herein; which said bond is approved by the court and said appeal is allowed.

And on the same day, to wit, the 23d day of January, A. D. 1880, said complainant, by his solicitor, filed in said clerk's office his appeal bond in said entitled cause, which said bond is in the words and figures following, to wit:

Appeal bond.

Know all men by these presents that we, Augustus H. Burley, assignee in bankruptcy of David Kriegh and Charles W. Kriegh, bankrupts, as principal, and Francis H. Kales and Louis Grant Pratt, as sureties, all of Chicago, Cook County, Illinois, are held and firmly bound unto Thompson J. S. Flint, of Larchmont Manor, in the State of New York, in the penal sum of one thousand dollars lawful money of the United States, for the payment of which well and truly to be made,
we bind ourselves, our successors, heirs, executors, and adminis-
53 trators, jointly, severally, and firmly by these presents. Wit-
ness our hands and seals this seventeenth day of January, A. D. 1880.

The condition of this obligation is such that whereas, on the motion of the said Thompson J. S. Flint, the circuit court of the United States for the northern district of Illinois, did, by an order entered on the 8th day of January, A. D. 1880, dismiss a certain bill of review filed therein on the 17th day of October, A. D. 1879, by the said Augustus H. Burley, as assignee as aforesaid, against the said Thompson J. S. Flint and others, from which order of said court the said Augustus H. Burley, as such assignee as aforesaid, then and there prayed and obtained an appeal to the Supreme Court of the United States to reverse said decree and judgment.

Now, therefore, if the said Augustus H. Burley, as assignee as aforesaid, shall duly prosecute the said appeal to effect, and moreover answer all damages and costs if he shall fail to make his said plea good, then this obligation shall be void; otherwise to remain in full force and virtue.

AUGUSTUS H. BURLEY, [SEAL.]
Assignee.
FRANCIS H. KALES. [SEAL.]
LOUIS GRANT PRATT. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

54 (Endorsed:) Filed Jan'y 23d, 1880. Wm. H. Bradley, clerk.

55 NORTHERN DISTRICT OF ILLINOIS, *set:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Augustus H. Burley, assignee in bankruptcy of David Kriegh, is the complainant, and Thompson J. S. Flint et al. are the defendants, as the same appears from the files and records of said court, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 6th day of July, A. D. 1880, and of our Independence the 105th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsement on cover:) No. 544. Augustus H. Burley, assignee in bankruptcy of David Kriegh, appellant, vs. Thompson J. S. Flint. N. Illinois C. C. U. S. Filed 26th August, 1880.

IN THE

SUPREME COURT OF THE UNITED STATES.

AUGUSTUS H. BURLEY, ASSIGNEE IN BANKRUPTCY OF DAVID KRIEGH,

VS.

THOMPSON J. S. FLINT, DAVID KRIEGH, JANE E. KRIEGH, JAMES L. FLINT, FRANKLIN B. HOWELL AND JAMES W. CONVERSE.

Brief and Points in behalf of Appellant.

FRANCIS H. KALES,

Of Counsel.

CHICAGO:
PRESS OF BEACH, BARNARD & CO., LEGAL PRINTERS, NO. 104 RANDOLPH STREET
1881.

IN THE

SUPREME COURT OF THE UNITED STATES.

AUGUSTUS H. BURLEY, ASSIGNEE IN BANKRUPTCY OF DAVID KRIEGH,

VS.

THOMPSON J. S. FLINT, DAVID KRIEGH, JANE E. KRIEGH, JAMES L. FLINT, FRANKLIN B. HOWELL AND JAMES W. CONVERSE.

STATEMENT OF THE CASE.

In March, 1877, Thompson J. S. Flint filed a bill in the Circuit Court of the United States for the Northern District of Illinois to foreclose two mortgage deeds made by one David Kriegh and wife—one made in August, 1872, to secure the payment of $43,000, and one made in March, 1875, to secure the payment of $17,000,—making parties to his bill David Kriegh, Jane E. Kriegh, James L. Flint, Frank B. Howell and James W. Converse. Afterwards Augustus H. Burley, Assignee in Bankruptcy of David Kriegh, was made a party defendant on his own motion. On October 19th, 1877, a decree was entered in the said cause finding the amount due the complainant from the defendant, David Kriegh, to be $66,458.87, with interest from July 25th, 1877, and ordering the payment thereof within one hundred days, and that in default of so doing the premises in the mortgages mentioned, or so much thereof as might be sufficient to satisfy the amount due the complainant, should be sold at public auction by the Master in Chancery, "and that said Master make such "sale in accordance with the course and practice of this "court."

The sale was made by the Master in Chancery and reported to the court, and thereafter, on the 13th day of March, A. D. 1878, a further order or decree was entered by the court, in which the Master's report of sale is approved and confirmed. "And it is further ordered, "adjudged and decreed by the court, that the said Master "execute and deliver to Thompson J. S. Flint, the pur-"chaser named in said report of sale, a deed conveying "the said premises, and all right and title, legal or equita-"ble, of said defendants therein, so by said Master sold to "him as in said report mentioned. And it is further or-"dered, adjudged and decreed, that the said defendants, "and all persons claiming or to claim from, through or "under them, from and after the commencement of this "suit, and all persons having a lien subsequent to the "mortgage mentioned in the bill of complainant in this "cause, either by judgment or decree, or otherwise, upon "the premises described in said mortgage, and his and "their heirs and personal representatives, and all persons "having any lien or claim by, from, through, or under "such subsequent judgment or decree, and their heirs and "personal representatives, and all persons claiming under "them, be forever barred and foreclosed of and from all "equity of redemption, and other claim, legal or equitable

“of, in and to the said premises, and every part and par-
“cel thereof.

“And it is further ordered, that the said purchaser of said
“premises be let into possession thereof, and that any of
“the parties to this suit who may be in possession of said
“premises, or any part thereof, and any person or persons
“who, since the commencement of this suit, have come
“into possession under them, or either of them, deliver
“possession thereof to said purchaser on production of
“the Master's deed for said premises, and a copy of this
“order confirming said sale.”

The decree then goes on to find a balance still due the complainant after applying the amount realized from the sale on the amount due him as found in the former decree, and further provides that complainant have judgment for $\$29,843\frac{45}{100}$ against the defendant David Kriegh, “to be
“proved up for that amount in the matter of the estate
“of said David Kriegh in bankruptcy.”

A motion was made March 25, 1878, by defendants, to vacate the order confirming the sale, for inadequacy of price, which motion was, on the 23d day of April, overruled.

On October 17, 1879, Augustus H. Burley, assignee in bankruptcy of David Kriegh, and one of the defendants in the original bill, filed a bill of review, seeking to set aside the orders and decrees above mentioned for error of law apparent therein, which assignments of error are as follows:

“And your orator shows that the said decrees and
“orders are erroneous, and ought to be reviewed, reversed
“and set aside for many errors and imperfections therein
“apparent.

“Inasmuch as the order or decree of October 19, 1877, "orders the absolute sale of the property aforesaid without providing for or giving time for redemption, contrary "to the statute made and provided concerning sales of "real estate in Illinois under and by virtue of executions "or decrees of court.

"Inasmuch as the order or decree of March 13, 1878, "aforesaid, and the order of April 23, 1878, aforesaid, "confirming, ratifying' and approving the said order of "March 13, 1878, make no provision or allowance for the "redemption of the said land from the sale thereof by the "master as aforesaid; and further order and decree the "master to make an absolute deed of the said land or "property to the purchaser Thompson J. S. Flint; and "further order and decree that your orator and all parties "shall be forever foreclosed and barred from any and all "claim or right and equity of redemption, in or to said "land or property, contrary to law and to the statute "made and provided for the sale and redemption of real "estate in the State of Illinois, under and by virtue of "judgments, executions and decrees of court."

And by amendment allowed by the court the following: "And your orator further saith that the said decrees and "orders are further erroneous, and ought to be reviewed, reversed, modified and set aside, in so far as the "same profess to bar or prohibit your orator as assignee "as aforesaid, from redeeming the said premises from "said sale, contrary to the said statutes of the State of "Illinois, in that behalf."

"For all which manifest errors and imperfections in the "said orders and decrees appearing upon the face thereof, "your orator brings this his bill of review, to be relieved "in the premises."

Thereafter, on the seventh day of November, A. D.

1879, Thompson J. S. Flint, one of the defendants in the bill of review, entered a limited appearance, and moved to strike from the files and dismiss the said bill of review.

The grounds of the motion were, in substance, these:

1. That the matters assigned for error did not constitute error of law.

2. That the complainant in the bill of review had not obtained leave to file it.

3. That the decree had not been performed.

The court afterwards granted this motion, and dismissed the bill.

From the order dismissing the bill of review the complainant took an appeal to this court, and assigns the following errors.

ASSIGNMENT OF ERRORS.

I. The court erred in not overruling the motion to dismiss the bill of review.

II. The court erred in dismissing the bill of review.

III. The court erred in not retaining the bill for further proceedings, in accordance with the ordinary practice of the court.

I.

The errors above assigned may be considered under the general proposition, that the court erred in dismissing the bill of review.

1. A bill of review for error of law alone, is a matter of right, and does not require the leave of the court to file it.

Ricker v. *Powell*, 100 U. S., 104.
Story's Eq. Pl., Sec. 405.

2. A bill of review, for error apparent on the face of the record, is in the nature of a writ of error.

2 Daniel's Ch. Pr. (5th Ed.), 1576, note 6.
Smith v. *Clay*, Amb. Ch., 647.
Kenner v. *Smith*, 8 Yerg., 206.
Payne v. *Beech*, 2 Tenn. Ch., 708.

3. Performance of the decree, where a bill of review is filed for error of law only, is not a *necessary* condition of filing it.

Filing a bill of review does not stay the execution of the decree which is complained of.

Williams v. *Mellish*, 1 Vernon, 117.

But where leave of court is required as a condition of filing the bill, the court may impose the obligation of performance of the decree, where practicable, as a condition of permitting the bill to be filed.

Where no permission to file the bill is necessary it would seem that no condition of performance should be imposed.

4. So far as the receiving of the bill by the court could be discretionary, that was not an arbitrary discre-

tion, and can be reviewed, and the *allegations of performance examined.*

Here, the bill shows a sufficient performance of the decree.

(1.) A sale had been had.

(2.) An order was passed, permitting the amount of the deficiency to be proved up against David Kriegh in bankruptcy.

(3.) The decree of foreclosure finding the amount due and ordering payment, and, in default thereof, directing a sale of the property, is a decree in the alternative, and gives the option of paying the money or allowing the property to be sold.

Gochenor v. *Mowry*, 33 Ill., 331.
Glover et al. v. *Benjamin*, 73 Ill., 42.

In the present case, the decree was performed by a sale, and the costs were paid, as appears by the decree of March 13, 1878. (Rec., 14 25.)

An order for proving up the balance against Kreigh as a bankrupt, (Rec., 15), is not, from its very nature, such a decree as requires performance by the defendants in that case who are represented by the complainant in the bill of review.

Partridge v. *Usborne*, 5 Rus. Ch., 195.
Wiser v. *Blachly*, 2 John. Ch., 488.

(4.) The remaining matter requiring performance is, that the purchaser be let into possession, and that is expressly alleged in the bill of review to have been done. (Rec., .)

(5.) The bill of review does not touch any part of the decrees or orders in the case except for error in cutting off the mortgagor's right of redemption. By selling the property under the decrees cutting off the right of redemption, the complainant in the original bill has obtained all the performance, as respects that question, which it is possible to give him.

Brine v. *Insurance Co.*, 96 U. S., 627.
Orvis v. *Powell*, 98 U. S., 176.

II.

The bill being properly in court, the usual manner of testing its sufficiency on the merits, is by demurrer.

Story's Equity Pleadings, Sec. 634.
2 Daniell's Chancery Practice, 1583.
Webb v. *Pell*, 3 Paige, 368.
Slingsby v. *Hale*, 1 Cases in Chancery, 122.
Gould v. *Tancred*, 2 Atkyns, 534.
Dancer v. *Evett*, 1 Vernon, 392.

1. But a motion to dismiss a bill of review, or strike it from the files, seems, in some cases, to have been allowed.

Hodson v. *Ball*, 1 Phillips' Chan. Rep., 183.
Griggs v. *Gear*, 3 Gilman, 2.
Horner v. *Zimmerman*, 45 Ill., 14.

In all these cases the bills were, however, filed for matter extraneous to the record, and, in most of them, without obtaining the necessary leave of court.

2. If the practice of permitting a motion in such cases as the present can be permitted, it is only upon the ground that the motion operates as a demurrer. Nor have we objection to the motion being so considered, as was practically done by the court below.

III.

THE BILL, ON ITS FACE, SHOWS ERROR OF LAW IN THE DECREES SOUGHT TO BE REVIEWED.

1. The statutes of Illinois provide for redemption in cases of sale in foreclosure of mortgages.

The provisions of the statute in force from July 1, 1872, are as follows:

Laws of Illinois, 1871–72, page 507.

SEC. 16. "When any real estate is sold by virtue of "an execution, judgment or decree of foreclosure of mort- "gage, or enforcement of mechanic's lien, or vendor's lien, "or for the payment of money, it shall be the duty of the "sheriff, master in chancery, or other officer, instead of "executing a deed for the premises sold, to give to the "purchaser a certificate describing the premises purchased "by him, showing the amount paid therefor, or if pur- "chased by the person in whose favor the execution or "decree is, the amount of his bid, the time when the pur- "chaser will be entitled to a deed, unless the premises "shall be redeemed, as provided in this act."

SEC. 17. "The sheriff, master in chancery, or other "officer, making the sale, shall within ten days from such "sale, file in the office of the recorder of the county in "which the property is situated, a duplicate of such cer- "tificate, which shall be recorded by such recorder; and "such certificate or duplicate, or record, and certified "copy of the record thereof, shall be evidence of the facts "therein stated."

SEC. 18. "The defendant, his heirs, administrators, "assigns, or any person interested in the premises, through

under the defendant, may redeem the real estate
sold, by paying to the purchaser thereof, his execu-
“ tors, administrators or assigns, or to the sheriff or mas-
“ ter in chancery, or other officer who sold the same, or
“ his successor in office, for the benefit of such purchaser,
“ the sum of money for which the premises were sold or
“ bid off, with interest thereon at the rate of ten per cent-
“ um per annum from the time of such sale, whereupon
“ such sale and certificate shall be null and void.”

April 29th, 1873, section 18 of the above was amended (see laws Illiuois, 1873,) so as to read as follows:

SEC. 18. “ Any defendant, his heirs, administrators,
“ assigns, or any person interested in the premises through
“ or under the defendant, may within twelve months from
“ said sale, redeem the real estate so sold, by paying to
“ the purchaser thereof, his executors, administrators or
“ assigns, or to the sheriff or master in chancery, or other
“ officer who sold the same, or his successor in office, for
“ the benefit of such purchaser, his executors, administra-
“ tors or assigns, the sum of money for which the prem-
“ ises were sold or bid off, with interest thereon at the rate
“ of ten per centum per annum, from the time of such sale,
“ whereupon such sale and certificate shall be null and
“ void.”

Since which time there has been no material change in the statute.

These statutes are rules of property in Illinois, and the courts of the United States will give effect to them in foreclosures and sales.

Brine v. *Insurance Co.*, 96 U. S., 627.
Orvis v. *Powell*, 98 U. S., 176.

The Circuit Court, in the decrees rendered in the original suit for foreclosure, disregarded these rules of erty, and, in effect, directed the sale to be made with redemption, and that a deed to the purchaser be issued a once.

Under such a decree the defendant could not redeem. In the face of such a decree, the master or officers of the court making the sale could not lawfully, or perhaps without committing a contempt, have received the redemption money. Nor could they give back to the mortgage debtor or his assigns, any paper or certificate known to the law, which would have invalidated the decrees or deed to be issued in pursuance thereof.

2. Again, a sale ordered by the court without redemption, in a case where the decree should have preserved the right of redemption, was an unfair and illegal exposition of the property to a forced sale; and in that respect alone, the decree was oppressive and erroneous, in a case where, as here, the right of redemption was denied by the Circuit Court, and the practice had been of long standing, and not corrected by this court when the decree in this case, and the sale under it were made.

FRANCIS H. KALES,
Of Counsel.

IN THE

Supreme Court of the United States,

October Term, A. D. 1881.

AUGUSTUS H. BURLEY, ASSIGNEE, &c., *Appellant,* *vs.* JAMES L. FLINT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THOMPSON J. S. FLINT, DECEASED. *Appellee.*	No. 544.

BRIEF IN REPLY FOR THE APPELLANT.

FRANCIS H. KALES.
Of Counsel for the Appellant

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

IN THE

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AUGUSTUS H. BURLEY, ASSIGNEE, &c.,
Appellant.
vs.
JAMES L. FLINT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THOMPSON J. S. FLINT, DECEASED.
Appellee.

No. 544.

BRIEF IN REPLY FOR THE APPELLANT.

The points made on behalf of the appellee will be noticed in their order.

1. It is first claimed by the appellee that the decree rendered in the original case did not deprive the appellant of his right of redemption, but was an *error of form*, doing no harm.

The decree affords the best answer to this point. The first order, entered October 19, 1877, set forth *in ipsissimis verbis*, is found in the record, page 12, *et seq.*; and the second order, entered March 13, 1878, is in like manner set out in the record, pages 14, 15.

The *first* order finds the amount due on the mortgage foreclosed, and directs the mortgagor, or some other party defendant, to pay the same within one hundred days, and pay into court the costs to be taxed, and, in default of so doing, that the premises, so far as necessary, be sold to pay the same, and that the master make deed of sale in accordance with the course and practice of the court.

By the *second* order it appears that the premises had been sold by the master to the mortgagee; that the master had made report of his doings, which, by this decree, the court ratified and approved, *and further* "ordered, "adjudged and decreed that the master execute and "deliver to the purchaser a deed conveying the premises, "and all right and title, legal or equitable, of the defendants"; *and further*, that the defendants and all persons, &c., &c., "be forever barred and foreclosed of and from "all equity of redemption and other claims, legal or equitable, of, in and to the said premises, and every part and "parcel thereof."

Nothing can be plainer than that the language of the two orders, as now quoted, had instantaneous operation as a decree of the court (even if erroneous) to cut off the right of redemption secured by law to the debtor or his assigns. The bill prays that these orders be set aside.

The creditor by taking such a decree clearly announced that he would insist upon its terms; and the court, by pronouncing it, became bound, as it had jurisdiction of the parties and of the subject matter, to enforce its provisions and deny any claim or right of redemption; and the officers of the court were also bound by the decree, and thereby legally and effectually forbidden to take the redemption money of the property, had it been offered within the statutory period.

But, notwithstanding all this, the counsel for the appellee claim that the decree did not deprive the appellant of his statutory right of redemption. And, in support of that theory, and to overrule the force and effect, as an authority, of the case of *Brine* v. *Insurance Co.*, they cite the case of *Suitterlin* v. *Life Ins. Co.*, 90 Ill., 483, as a precedent establishing their proposition. If it be admitted that there are some expressions of the court in that case which, taken by themselves, would give color to the view of the appellee, still, the two cases are widely different. The present case is a *direct* proceeding, like a writ of error, to reverse the foreclosure decrees for error of law apparent on their face, while the *Suitterlin case* was a bill to redeem.

The *Suitterlin case* does, perhaps, establish this much, namely, *that the error of not permitting a redemption was not jurisdictional*, but it does not decide that such an error would not have been fatal, even in that court, had the case come up on an appeal or been presented to the lower court by a bill of review. The *Suitterlin case* being a bill to redeem, the decree of foreclosure, from which redemption was sought, was not, nor could it be, in such a case, attacked directly, as in the case of a writ of error or bill of review: but, on a bill to redeem, it was necessarily questioned collaterally. In such cases, the inquiry of the court is directed and confined to the question, whether there was jurisdiction of the parties and of the subject matter when the decree was rendered. In the *Suitterlin case*, no attack it appears was made upon the jurisdiction of the court to render the decree which authorized the sale from which a redemption was sought. If the language of the Supreme Court of Illinois in that case be limited to those cases where judgments or decrees are collaterally and not directly attacked, no fault can be found with the conclusion to which the court arrived, in denying a right of redemption, even if the opinion goes beyond the case itself.

The learned counsel for the appellee have fallen into two errors in the present case: (1.) That a decree which in express terms cuts off the right of redemption is a mere error of form; and (2), that a bill of review for error of law apparent on the face of the decree, is one and the same thing as a bill to redeem.

Nothing can, however, be more substantial *or equitable*, than the right of redemption; and it has ever been the delight of courts of equity to preserve that right as between borrower and lender. The difference, too, between a bill to redeem and a bill of review, is elementary. The latter, where there is error of law apparent on the face of the decree, requires the assertion of no additional equity whatsoever to entitle the complainant to the ordinary relief of a reversal of the decree complained of. On the other hand, no bill to redeem can stand for a moment in a court of equity, unless it affirmatively shows sufficient grounds of equity to sustain it.

It appears from the opinion of the learned judge in the court below (appellee's brief, 38-9), that he was not prepared to admit the validity of this distinction, and he therefore applied to this case the doctrine of the *Suitterlin case*, where the question had necessarily arisen collaterally.

2. The second point made by appellee is, (1) that the appellant was not aggrieved by the decree complained of, and (2), that therefore his bill of review should not have been filed without leave, nor (3), retained even if leave had been granted to file it.

But, the error of law apparent on the face of the decree, cutting off the appellant's right of redemption, is a sufficient grievance to bring the case within any rule on that subject; and, in such cases, the uniform current of decisions sustains the practice of permitting the filing of the bill without leave, and of requiring the court, after it has been filed, to retain and pass upon it, subject, perhaps, to the rule requiring performance.

3. In the appellee's third point it is assumed that only the first order or decree directing a sale, is sought to be set aside. This assumption is erroneous. The bill of review, as contained in the record, sets forth all of the orders and decrees bearing upon the question of the sale of the property, and of the deed and of the effect of the sale. (Rec. pp. 12 to 17.) On page 16, it is alleged that the order of October 19, 1877, directs the absolute sale of the property without providing or giving time for redemption, and also, that the confirming order of March 13th makes no provision for redemption from the sale of the premises, but that it, on the contrary, expressly orders the master to make an absolute deed to the purchaser, and decrees that all parties shall be forever foreclosed and barred of all redemption. A reversal of these decrees is expressly prayed in the bill of review.

The decree of October 19, *supra*, is, however, taken by itself, identical in form with the decree in the *Brine case*, from which an appeal was taken to this court, and the decree pronounced erroneous. But, in the present case, is found the *additional decree* of confirmation, where, in express terms, the right of redemption is adjudged to be barred.

The error of the Circuit Court, as shown by the record and assigned in the bill of review in the present case, is identical with that assigned in the *Brine case*, and that case, therefore, is a conclusive authority for the position that an appeal from the foreclosure decrees in this case could, within the statutory period, have been prosecuted to this court, and consequently that a bill of review within a like period is a proper remedy to be invoked in the court below, as was done in this case.

4. In the fourth point the appellee insists upon the doctrine of *laches*. That doctrine is here inapplicable. The general rule of this and of other courts is, that where error appears upon the face of the decrees, a party has the same time within which to exhibit his bill of review, as he has to prosecute a writ of error or appeal.

The rule is sometimes varied, in cases where the grounds for a bill of review are extraneous matter, such as newly-discovered evidence and the like. In all such cases it is necessary for a party to obtain leave to file the bill, and it is in a measure discretionary with the court to grant or deny the motion. In such cases reasonable diligence may be required.

None of the cases cited for the appellee under this point controvert the rule of practice as thus stated and limited.

5. The fifth point of the appellee is sufficiently answered by what is said in answer to the fourth point.

6. The sixth point, in view of the facts stated in the appellee's brief, p. 3, that the motion to dismiss was treated as a demurrer, does not seem to require any notice, beyond this, that the overruling of the demurrer was a denial of the sufficiency of the bill, even if it had been retained. But if there was error in the original decree the bill is sufficient.

7. The seventh point is, that it was a good objection to the bill of review that the decree sought to be set

aside had not been performed or the costs of the proceedings paid.

It will be observed that the motion to dismiss and strike the bill of review from the files, stated no grounds therefor. (Rec., p. 19.) But, if performance or payment of costs was a pre-requisite, the decree had been performed within the rule on that subject, as the record here shows.

In the argument of appellee's counsel on this point, it is claimed that the decree had not been performed, in three important particulars:

(1.) The amount adjudged to the complainant had not been paid.

(2.) Possession of the mortgaged premises had not been surrendered to him.

(3.) And the costs of the proceedings had not been paid to the complainant, he having advanced them, as part of his bid, to the master.

As to the first ground: It is a general rule, not always understood, or perhaps sometimes forgotten, that the decree in mortgage foreclosures is, primarily, *in rem* and not *in personam*: and the decree therefore is, that the land, and not the individual, shall pay the mortgage debt and costs. Such, too, is the doctrine of this court; and, because thereof, this court adopted a rule that, in certain cases, a deficiency decree, *in personam*, might be rendered, which, in the absence of such a rule, could not be done.

In the present case, the decree, in ascertaining the amount due together with the costs, and, in case of non-payment, directing the land to be sold, was, on that subject, in the common and ancient form of decrees of courts of equity, and merely charged the debt and costs upon the land, with a direction, unless paid, to sell the lands therefor. When the sale was made, as shown by this record, the decree *was* executed; or, in other words, was performed, within the meaning of the rule on that subject.

As to the deficiency not made: As we have already seen, the decree as entered was not *in personam*. But there was a deficiency remaining after the lien on the land had been exhausted. Still, no deficiency decree, charging the debt *in personam* on the mortgagor, Kriegh, was ever passed. On the contrary, he was in bankruptcy (Rec., 11), and the present appellant was and still is his assignee in bankruptcy. Under these circumstances, the court, in its decree of March 13, 1878, provided for the deficiency by decreeing that it might be proved up in bankruptcy against the estate of Kriegh, the mortgagor.

It should here be observed that nothing was to be done by way of performance by Kriegh, for it was evident he might receive his discharge in bankruptcy; nor, had there been jurisdiction in the circuit court to so order, was it directed that this deficiency should be paid out of the bankrupt's assets. These matters were left to the judgment of the district court, and there is nothing in the record here to show that it has since taken action.

As to the second ground, that possession of the mortgaged premises had not been surrendered: In the decree of March 13, 1878, (Rec., 14), is found the order of the court in regard to possession, and it is as follows:

"And it is further ordered that the said purchaser of "said premises be let into possession thereof, and that any "of the parties to this suit who may be in possession of "said premises, or any part thereof, and any person or "persons, who, since the commencement of this suit have "come into possession under them, or either of them, deliver possession thereof to said purchaser on production of the master's deed for said premises, and a copy of this order confirming said sale."

It will be observed that the order to deliver possession required the purchaser to perform certain conditions, namely, to produce a master's deed and a copy of the confirming order, before he would become entitled to demand the possession. It is further evident, that had the purchaser complied with these conditions, and demanded possession, the parties would have been in contempt for not delivering it, and it was in his power to have the aid of the court so as to acquire the immediate possession.

But, the bill of review in this case shows, on its face, that the purchaser did acquire possession. (Rec., 19-20.)

As to the third ground, namely, that the costs had not been paid: The decree of October 19, (Rec., 12-13), provided, in case the amount found due was not paid within the time limited, that the property should be sold to pay the *costs*, as well as the debt and interest.

In the decree of March 13, 1878, it is stated that it appears from the report of the master, that he had sold the premises; that out of the proceeds he had paid the sum of $76.48, being the amount of the taxed costs in the cause; that he had also deducted the master's fees and commissions, &c.; and that there remained to be applied on the complainant's debt, under the decree, the sum of $38,919.32.

It would seem, from this recital, that the mortgaged premises had paid all of the costs; so that, unless a redemption could be made, nothing would be due for costs to the complainant, Flint.

At the time the appellant filed his bill of review, he was in apt time to have prosecuted an appeal directly to this court, which on the authority of *Brine* v. *Ins. Co.*, would have been equally effective, although the time for so doing had nearly expired.

In view of the great burden of business resting on this court, it is submitted that the appellant ought not to be held to any strained construction of mere rules of procedure, because he was willing to proceed by a bill of review, which might have been effectual in the court below, instead of pursuing his remedy by appeal to this court. It is therefore respectfully submitted, that the decree of the Circuit Court should be reversed.

FRANCIS H. KALES,

Of Counsel for the Appellant.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1881.

AUGUSTUS H. BURLEY, ASSIGNEE, &c.,
Appellant,
vs.
JAMES L. FLINT, EXECUTOR OF THE LAST WILL AND TESTAMENT OF THOMPSON J. S. FLINT, DECEASED,
Appellee.

No. 544.

BRIEF AND ARGUMENT ON BEHALF OF APPELLEE.

E. B. M^c^CAGG, AND
W. I. CULVER,
Counsel for Appellee.

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

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Appellee.

No. 541.

STATEMENT OF THE CASE.

The appellant filed his bill of review in the court below, Oct. 17, 1879, from which it appears that on March 31, 1877, Thompson J. S. Flint filed in the same court his bill of complaint for the foreclosure of two mortgages, made by David Kreigh and wife, to secure an aggregate indebtedness of sixty thousand dollars and interest to accrue thereon, and that such proceedings were had under that bill, that October 19, 1877, a decree was entered, finding due the complainant, Flint, from Kreigh, the sum of $66,458.87, with interest thereon from July 25, 1877, and ordering the same to be paid within one hundred days, or that in default of such payment, the mortgaged premises be sold by the Master in Chancery, in accordance with the course and practice of the Court.

And that sale was made by the Master, in accordance with the decree, and duly reported to the Court, an order being entered March 13, 1878, confirming the sale and directing the Master to make and deliver a deed to the purchaser.

That afterwards, a motion was made by the solicitors for defendants in that proceeding, to vacate the order confirming the sale, and ten days' time was given them to file affidavits in support of their motion.

That nearly a month later, no affidavits having been filed in the meantime, the motion to vacate was overruled, and the previous order and the sale were ratified and confirmed.

The deed executed by the Master was not delivered by him to the purchaser till after the statutory right to redeem had expired, that is, not until more than fifteen months after the day of sale.

The specific reason given for filing the bill of review was that the decree of October 19, 1877, ordered the absolute sale of the mortgaged property, "without providing for or giving time for redemption, contrary to the "statute made and provided concerning sales of real estate "in Illinois, under and by virtue of executions or decrees "of court," and that the orders following directed the making of a deed by the Master, and confirmed the sale without redemption. This bill of review was filed without leave of court, October 17, 1879, two years, lacking two days, after the entry of the final decree of sale complained of.

It is, in effect, a bill to redeem; and yet, unlike such a bill, it makes no offer to pay the mortgage debt, nor even the costs of the foreclosure proceeding.

Counsel for Thompson J. S. Flint (entering a limited appearance for that purpose) filed a written motion to strike from the files and dismiss the bill, for reasons then presented to the Court and which will hereinafter appear.

At the suggestion and request of counsel for appellant, the motion to dismiss was treated also as a demurrer for the purpose of enabling the Court to consider and pass upon the equities of the bill.

After argument, the Circuit Court, Judge BLODGETT presiding, dismissed the bill, delivering an opinion which we append. The appellant appeals to this Court, and it has been argreed that the cause shall be submitted at this term under the twentieth rule.

Pending the appeal, the original appellee, Thompson J. S. Flint, has died, and his proper representative, James L. Flint, the executor of his last will and testament, voluntarily comes in under the fifteenth rule of this court and asks to be admitted as a party to the suit, and that the cause may be heard and determined as in other cases.

BRIEF OF THE ARGUMENT.

I. The decree sought to be set aside by the bill of review did not deprive the appellant of his statutory right of redemption, and if erroneous in form, it did him no harm.

Walker v. *Schum*, 42 Illinois, 462.
Boester v. *Byrne*, 72 Illinois, 466.
Suitterlin v. *Conn. Mut. Life Ins. Co.*, 90 Illinois, 483.

II. Appellant not having been aggrieved by the decree complained of, his bill of review should not have been filed without leave, nor should it have been retained even if leave had been granted to file it.

Thomas v. *Harvie's Heirs*, 10 Wheat., 146. (see p. 151.)
Story's Equity Pleadings, Sec. 411.
Whiting v. *Bank of U. S.*, 13 Peters, 6.
Fleming v. *Stout*, 19 Indiana, 328.
Guerry v. *Perryman*, 12 Georgia, 14.

III. The proceedings subsequent to the final decree sought to be set aside by bill of review, including the sale, the confirmation of it by the Court, the ordering of a master's deed and its execution and delivery, were but steps in the execution of the decree, and any irregularity or error in those particulars, is not the subject of review.

Conover v. *Musgrave, et al.*, 68 Illinois, 58.
Whiting et al. v. *Bank of U. S.*, 13 Peters, 15.
Story's Equity Pleadings, Sec. 408 *a*.

IV. Appellant's *laches* precluded him from sustaining his bill of review, filed more than fifteen months after the foreclosure sale.

Rubber Co. v. *Goodyear*, 9 Wall., 805.
Farmer's Loan & Trust Co. v. *Green Bay & Minnesota R. R. Co.*, 6 Federal Reporter, 100.
Noyes v. *True*, 23 Ill., 503.
Prather v. *Hill*, 36 Ill., 402.
Fergus v. *Woodworth*, 44 Ill., 374.
Carpenter v. *Carpenter*, 70 Ill., 457.
R. & M. R. R. Co. v. *F. L. & T. Co.*, 86 Ill., 187.

V. Appellant should have obtained leave, by petition or motion, to file his bill of review; and not having done so, it was properly dismissed for that reason alone.

Rubber Co. v. *Goodyear*, 9 Wall., 805.
Dexter v. *Arnold*, 5 Mason, 303.
Carroll v. *Parran*—Note to *Burch* v. *Scott* 1 Bland, 125.
2 Barb Ch. Pr. (1st Ed'n), 96.

VI. The proper way to raise an objection to the appellant's right to file the bill, was for the defendant, upon his first appearance, to move to strike it from the files, or dismiss it, as was done.

Griggs et al. v. *Gear*, 3 Gilm., 2.
Hodson v. *Ball*, 1 Phil., 183.
Horner v. *Zimmerman et al.*, 45 Ill., 14.
Forman v. *Stickney et al.*, 77 Ill., 575.
Cochran v. *Rison*, 20 Ala., 463.

VII. It was a good objection to the bill of review, that the decree sought to be set aside had not been performed, or the costs of that proceeding paid.

Massie's Heirs v. *Graham's Admrs.*, 3 McLean, 41 (see p. 47).
Wiser v. *Blachly et al.*, 2 Johns. Chy., 488.
2 Barb. Chy. Prac., 96 (1st Ed'n).
Bishop of Durham v. *Liddell*, 2 Bro. P.C., 63.

ARGUMENT.

I.

THE DECREE SOUGHT TO BE SET ASIDE DID NOT DEPRIVE APPELLANT OF HIS RIGHT OF REDEMPTION, AND THEREFORE DID HIM NO HARM IN A LEGAL SENSE.

The case of *Brine* v. *Insurance Co.*, 96 U. S., 627, established as a condition to the transfer of title by judicial proceedings, in the Federal Courts in Illinois in foreclosure suits, that there shall remain to the mortgagor the right of redemption for twelve months, and if such redemption is not made, to judgment creditors a similar right after the expiration of the twelve months, and within fifteen months after the sale, that being a rule of property prescribed by the legislature of the State. The statute prescribing the period and right of redemption was held to enter into and become a part of the mortgage itself. But it was also said:

" It is not necessary, as has been repeatedly said in this
" court, that the form or mode of securing a right lik-
" this should follow precisely that prescribed by the state
" ute. If the right is substantially preserved or secured,
" it may be done by such suitable methods as the flexi-
" bility of chancery proceedings will enable the court to
" adopt, and which are most in conformity with the prac-
" tice of the court."

It would appear, therefore, that if in the original suit the right of redemption was substantially preserved or secured to the parties interested, notwithstanding the form of the decree of sale, the party who files this bill of review is in no position to complain, and is without standing in a court of equity to attack it by bill of review or other collateral proceeding. The mere form of the decree, if his right to redeem from the sale might have been enforced within the period allowed by the statute, is of no consequence. If it is plain that he could have redeemed, but has suffered the time for redemption to expire by his own *laches*, it is now too late for him to attack the decree or the sale.

Though the bill of review is silent as to the date of the sale by the master, it must have been prior to March 13, 1878, since the sale was confirmed by the order of the Court on that day. That was more than *nineteen* months before the filing of this bill of review.

The master's report of sale was dated February 23d, 1878, nearly *twenty* months before the filing of the bill of review. (Printed Record, 15.)

The Supreme Court of Illinois, with the decision in the *Brine* case before it, has decided that under such a decree as is here complained of, the right of redemption remains and may be invoked, if done within the period prescribed by the statute. The opinion says: "The "decree finding the amount due was good, and also "the order of sale, if the amount was not paid within "a hundred days. The defect was, in adding to the "order of sale that it should be without redemption. "Hold that additional portion of the order of sale to "be void, then it is null, as if it were not, and the simple "order of sale stands, which has been executed and "a deed given. *The statute gave to the mortgagor the "right to redeem, and he might have exercised it. It is*

“ *not the decree that gives the right to redeem. The mortgagor*
“ *does not depend upon that for the right, but*
“ *upon the statute.* We apprehend that in a decree of
“ foreclosure, a mere order of sale would be sufficient,
“ saying nothing about redemption; that the right of
“ redemption would not be interfered with under such an
“ order, but would exist in full force, by virtue of the
“ statute, and that it would be the duty of the officer, in
“ the execution of the order of sale, to follow the directions
“ of the statute. *But suppose he should not do so, and*
“ *upon sale made, instead of giving a certificate of the*
“ *sale, and that the purchaser would be entitled to a deed at*
“ *the end of fifteen months, if the premises should not be redeemed,*
“ *as the statute directs, should do as was done in the*
“ *present case execute a deed at once?* We think that
“ would not defeat redemption, nor give right of present
“ possession, at least in equity, but that the statute would
“ control, and the right of redemption and of present possession
“ remain by virtue of the statute, and that the deed
“ would remain inoperative in effect until the expiration of
“ the period for redemption. The decree, here, has been
“ executed, the sale made and deed given. The wrongful
“ circumstance was the making of the deed at the time of
“ the sale, instead of deferring its execution until fifteen
“ months afterward. The deed was prematurely made,
“ but if it be held as not affecting any right of the debtor
“ in consequence thereof, why may it not stand and remain
“ as an operative deed, after the expiration of the
“ period of redemption, where no attempt had been made
“ to assert the right of redemption? It is not perceived
“ what legal harm can have resulted to appellant from the
“ decree being in its present form, instead of with redemption.
“ * * * Had all been in regular form,

"and a certificate of purchase only given on the sale, the "purchaser would have now been entitled to a deed, there "having been no effort for the exercise of the right of redemption. Now having the deed, notwithstanding it "was prematurely executed, we think the purchaser may "hold it, *there not appearing to be any equitable ground for "the interposition of a court of equity to set it aside, and allow redemption, at the present time.*"

Suitterlin v. *Conn. Mut. Life Ins. Co.*, 90 Illinois, 483.

The principle thus announced was not new in Illinois, for in 1867 the Supreme Court of that State in construing the act of 1843, which gave redemptions from sale of mortgaged premises under foreclosure proceedings, as in cases of sales on executions at law, held that a defendant to a bill of foreclosure, by failure to have a sale set aside until the period of redemption expired, waived all technical objections.

Walker v. *Schum*, 42 Ills., 462.

And in 1874, that Court held on a direct appeal to reverse a decree of foreclosure, that while the more formal mode of decreeing a foreclosure of a mortgage is to direct that the mortgagor pay the amount due, and, in default of payment, that the master sell the land, and if not redeemed, then all the rights of the defendants be foreclosed: yet that the right of redemption provided by the statute will not be considered as denied by a decree, although it may declare a foreclosure without reference to the subject of redemption.

Boester v. *Byrne*, 72 Illinois, 466.

If it be true, to paraphrase the language of the Supreme Court of Illinois, that no legal harm can have resulted to the party who files this bill of review, from the decree in the original suit being in the form complained of, instead of with redemption, it follows, upon undoubted and abundant authority, that such bill should not be entertained. That all the party's statutory rights were preserved to him, notwithstanding the form of the decree, is held by this Court in the *Brine* case, and by the Supreme Court of Illinois in the *Suitterlin* and other cases. If he has suffered the period of redemption to expire without availing himself of his rights, his own *laches*, and not the action of the Court, bars his equity of redemption, and quiets and perfects the title of the purchaser at the foreclosure sale.

It needs no array of authorities to support the proposition that these decisions of the Supreme Court of Illinois, construing a rule of property in that State, are binding upon the federal courts. It has been so often conceded by this Court that the judicial department of each State is the appropriate organ for construing the acts of the legislative branch of the State government, that it is no longer debatable. And we understand this rule to apply even in cases where this Court had previously put a different construction upon a State statute than the one finally adopted by the highest court of the State.

The Princess Alexandra, 8 Benedict, 209.

It is clear that the Supreme Court of Illinois, in the *Suitterlin* case, has, since this Court decided the *Brine* case, placed a construction upon the Illinois statute providing for redemption from foreclosure sales, which has had a tendency to quiet titles acquired under judicial proceedings in the Federal Courts in this State, and it would be anomalous if the Federal Courts should hesitate to follow that construction and thus protect their own decrees and those who have relied upon them. It is not improbable that the State Court, aware of the practice in foreclosure proceedings so long prevailing in the Federal Courts in Illinois prior to the decision in the *Brine* case, and mindful of the uncertainty, doubt and difficulty to result from a ruling that titles so acquired were without validity, saw fit, as a matter of public policy, to say, as it has in the *Suitterlin* case, that the lapse of fifteen months after foreclosure sale, should leave the proceedings no longer the subject of successful attack merely because of a provision in the decree which was without legal force, which did not have the effect to abridge the statutory right of redemption, and which was, therefore, mere surplusage.

The decree complained of in the bill of review did not operate to deprive the appellant of any statutory rights, and resulted in no such harm to him as he alleges, for the right to redeem, and the mode of asserting that right, were creatures of the statute, and were preserved by it.

Tuolumne Redemption Co. v. *Sedgwick*, 15 Cal., 515.

II.

APPELLANT NOT BEING AGGRIEVED BY THE DECREE COMPLAINED OF, HIS BILL OF REVIEW WAS PROPERLY DISMISSED.

It is a familiar rule that an error which does no harm is not sufficient ground to reverse a judgment or decree, even on direct appeal or writ of error.

Goucher v. *Patterson*, 94 Ill., 525.
Reed v. *Pixley*, 25 Minn., 482.
Greenleaf v. *Birth*, 5 Peters, 132.
Vansant v. *Allmon*, 23 Ill., 30.
Blackwell v. *Patton*, 7 Cranch, 471.

And much more is this true, where the reversal is sought by bill of review involving the equitable action of the court.

Appeals are favored, writs of error are writs of right, but bills of review are neither the one nor the other. Under the latter, if not under the former, the effect of the *Suitterlin* case upon the present rights of the parties may, with propriety, be considered as conclusive.

It was early settled by this Court that leave to file a bill of review ought not to be granted in a case where it appears that the party presenting it is not aggrieved by the decree complained of, on account of the error assigned; or, that being granted, the Court ought, in such a case, to dismiss the bill.

Thomas v. *Harvie's Heirs*, 10 Wheat. 146
(see p. 151.)

And again:

"No party to a decree can, by the general principles "of equity, claim a reversal of a decree upon a bill of "review, unless he has been aggrieved by it, whatever "may have been his rights to insist on the error at the "original hearing, or on an appeal."

Whiting et al. v. *Bank of United States*, 13
Peters, 6.

The error complained of in the original decree being one of form only (since, as we have seen, it worked no substantial injury), although apparent upon the face of the decree, cannot be considered a sufficient ground for review.

Story's Equity Pleadings, Sec. 411.
Fleming v. *Stout*, 19 Indiana, 328.
Guerry v. *Perryman*, 12 Georgia, 14.

If, instead of filing his bill of review, the appellant had elected to appeal from the decree complained of to this Court, the utmost he could have hoped to accomplish would have been to obtain, not a reversal, but an affirmance of the decree except so far as it failed to give a time for redemption.

Brine v. *Ins. Co.*, 96 U. S., 627.
Orvis v. *Powell*, 98 U. S., 176.

But we have seen that the decree did *not* affect his right of redemption. The time for its exercise having elapsed when his bill of review was filed, what could it avail him to decree upon it that he might redeem? This would have been to determine against the complainant in the original bill a right to which he had become entitled by virtue of the very statute invoked by the appellant himself. It would have been to deprive him of an estate which had become vested; an estate which he may be said to have contracted for when he became the creditor of the mortgagor. If the right of redemption was impliedly included in the contract, its expiration in fifteen months after foreclosure sale was also impliedly anticipated and bargained for. The sale was good, but it did not, notwithstanding the form of the decree, prevent redemption, the decree in this respect being a nullity. If so much of it were reversed, as provided that a deed should be made upon confirmation of the sale, and all equity of redemption barred (which is the only error alleged in the bill of review) the sale would still stand, and the statutory time within which the right of redemption could be exercised, was past when the bill of review was filed, so that action upon it could have availed the appellant nothing.

III.

MATTERS TRANSPIRING IN EXECUTION OF THE FINAL DECREE COMPLAINED OF ARE NOT THE SUBJECT OF REVIEW, NO FRAUD BEING ALLEGED OR PRETENDED.

Conover v. *Musgrave*, 68 Illinois, 58.
Whiting v. *Bank of U. S.*, 13 Peters, 15.
Story's Equity Pldgs, Sec. 408 *a*.

But in the case stated by the bill of review, no harm was done the appellant by the manner in which the decree complained of was executed. A brief reference to the record will demonstrate this. The various steps alleged to have been taken in the original suit, stated chronologically, were as follows:

The original bill of foreclosure was filed by Thompson J. S. Flint, March 31st, 1877. (Printed Record, p. 2.)

On June 9th, 1877, appellant, on his own motion, was made a party defendant, and answered the bill. (Printed Record, 10.)

The final decree was entered October 19th, 1877. (Printed Record, 12.)

The sale was reported by the master February 23d, 1878 (Printed Record, 15), and confirmed March 13th, 1878. (Printed Record, 14.)

On March 25th, 1878, appellant moved the Court to vacate the order confirming the sale, and obtained ten days' time to file affidavits in support of his motion. (Printed Record, 15.)

Nearly a month later, (April 23d, 1878,) no affidavits having been filed, his motion was overruled and the sale re-confirmed. (Ibid.)

Neither the appellant nor Kreigh ever did any act towards surrendering possession of the premises to the complainant in the bill of foreclosure, *nor was the deed of the master delivered to him until October 9th, 1879.* (Printed Record, 16.)

The delivery of the deed from the master was not made, therefore, until more than *nineteen* months after the sale, or more than *four* months after the statutory period of redemption had expired.

Nothing was done hurriedly; no effort was made to cut the appellant off from any rights which he might fairly claim; and the purchaser at the foreclosure sale did not, as we have seen, obtain his deed until more than fifteen months after the sale. In all this where can be found any cause of complaint by the appellant? All he can say in regard to the surrender of possession is that a tenant of the premises who had gone in under Kreigh and Flint as joint owners, had, *prior* to the filing of the bill of review, accounted for the rent to Newbury, an agent of Flint. (Printed Record, 16.) How long prior? Presumably after Flint had obtained his deed, viz: more than *nineteen* months after the sale. If the statute of Illinois in relation to redemptions had been strictly followed to the letter, in what respect would the appellant have been better off than he really was? The right to redeem was never denied him before Flint obtained a delivery of the deed from the master; he never claimed it; he made no attempt to assert it; and it follows that the manner of execution of the decree of which he complains could have done him no harm.

IV.

APPELLANT'S LACHES PRECLUDES HIM FROM SUSTAINING HIS BILL OF REVIEW.

As we have seen, more than fifteen months were suffered to elapse before he attempted to attack the foreclosure sale. During all this time the master's deed remained undelivered. Appellant's rights were in no wise jeopardized or prejudiced if he had chosen to assert them in apt time and in a proper and legal way. He stood idly by; suffered a title to vest in the purchaser at the sale by lapse of time and the delivery of a deed; made no offer to redeem; and having been content to remain silent when he should have spoken, to remain idle when he should have taken active steps to redeem from the sale, justice now demands that his silence should continue. His bill is wholly without equity.

That bills of review are subject to the equitable rule in reference to *laches* is abundantly settled.

Rubber Co. v. *Goodyear*, 9 Wall., 805.

Farmer's Loan & Trust Co. v. *Green Bay & Minnesota R. R. Co.*, 6 Federal Reporter, 100.

The rule itself grows out of the natural disinclination of courts to aid those who have slept upon their rights. Activity, good faith and reasonable diligence are essential to call forth the exercise of judicial authority; where these are wanting courts of equity are passive, and do nothing. *Laches* and neglect are always discountenanced.

Carpenter v. *Carpenter*, 70 Ill., 457.

In one case in Illinois a bill was filed about a year after an execution sale of lands, to set it aside for irregularities. The court held the bill was filed too late, saying:

"Where the party has manifested such apathy and in-"difference to his rights as to delay all proceedings for "that period (one year) it has more the appearance of a "desire to procure delay, than to relieve himself from in-"justice and oppression."

Noyes v. *True*, 23 Ill., 503.

And this rule on the subject of *laches*, irrespective of all statutes of limitation, consistently prevails in Illinois, as applied to all proceedings in equity.

Prather v. *Hill*, 36 Ill., 402.
Fergus v. *Woodworth*, 44 Ill., 374.
R. & M. R. R. Co. v. *F. L. & T. Co.*, 86 Ill., 187.

In *Fergus* v. *Woodworth*, *supra*, the Supreme Court of Illinois said:

"After the time of redemption has expired and his "equity is barred, the mortgagor should not be heard to "impeach the sale, except by showing that there was "fraud or oppression, and that substantial injury had re-"sulted, and even then it might be necessary to afford a "reasonable excuse for having delayed such a length of "time before asserting his rights." (44 Illinois 379.)

It seems, therefore, that for this reason alone the appellant's bill of review was properly dismissed.

V AND VI.

In the brief of this argument it is suggested that the appellant's bill was improperly filed without leave, and that the proper way to take advantage of his omission to petition for leave, was by motion to dismiss.

Inasmuch as the record shows that the motion to dismiss was also treated as a demurrer (Printed Record, p. 21), it is unnecessary to discuss the second proposition except as it incidentally arises under the next point, and we will rest the first upon the authorities cited in the brief and the following suggestions:

It is the usual, if not uniform practice, where bills of review are filed, for parties to first obtain leave of court, by petition or motion. And "whether such an appli-
"cation shall be granted or refused, rests in the sound dis-
"cretion of the court. The requisite leave is never a mat-
"ter of right."

Rubber Co. v. *Goodyear*, 9 Wall., 805.
Dexter v. *Arnold*, 5 Mason, 303.

"*Carroll* v. *Parren*, February, 1733, bill of review,
" subpœna issued; upon motion of defendant's counsel, that
" the bill be dismissed: *ordered*, that the said bill be dis-
" missed with costs; leave not being given either by peti-
" tion or motion to file such bill of review."

Note to Burch v. *Scott*, 1 Bland, 125.
2 Barb. Ch. Pr. (1st Ed.) 96.

It will be said, however, that it is not necessary to obtain leave of court before a bill of review for error of law apparent on the face of the decree can be filed, but that the filing of the same is a matter of right. We are not unmindful of the number of cases so holding, nor do we deny their authority.

In Alabama, where a bill of review was filed for error apparent on the face of the original decree, it was held that though upon an appeal or writ of error the decree might be considered erroneous, that was not sufficient to authorize the filing a bill of review. It would be to invade the province of the Appellate Court. It was said (irrespective of the peculiar provisions of the Alabama statutes): "It cannot be doubted that there may be cases, "even of error apparent upon the decree, where circum-"stances might exist, making it improper to permit a bill "of review to be filed."

P. & M. Bank v. *Dundas et al.*, 10 Ala. (N. S.), 661, (see p. 669).

And the court will see, by reference to the Illinois cases cited in the brief, that the proper way to present the effect of the non-performance of the original decree, or of Mr. Burley's failure to obtain leave to file the bill of review without such performance, was by the motion made. So that, though to file such a bill be a matter of right to some extent, it might still be dismissed on motion, in a proper case, as the only technically correct method of securing all the rights of the parties against whom it is exhibited.

If, for any reason, the bill of review was irregularly or improvidently filed, whether because leave of court was not first obtained, or because upon the face of it it appears to be unmeritorious, and that it could avail the party filing it nothing in the end, "what is a more just, natural "or proper remedy than to take it off the file?"

Hodson v. *Ball*, 1 Phil., 183.

VII.

IT WAS A GOOD OBJECTION TO THE APPELLANT'S BILL THAT THE DECREE SOUGHT TO BE SET ASIDE HAD NOT BEEN PERFORMED, OR THE COSTS OF THAT PROCEEDING PAID.

By that decree the payment of money found to be due the complainant therein was ordered to be made. It was not averred by the bill of review that this order had been obeyed, nor that the court had excused performance.

"The ordinances of Lord BACON still govern bills of "review." * * * "By one of the ordinances of "Lord BACON, the decree must be performed before a "bill of review can be brought. If the decree be for "land, the possession of it must be surrendered; if it be "for money, the money must be paid."

Massie's Heirs v. *Graham's Admr's et al.*, 3 McLean, 41, (see p. 47).

This ordinance is set out in full in *Partridge* v. *Usborne*, 5 Russ., 233, and commented upon at length by the Lord Chancellor (LYNDHURST).

"The party who asks for a bill of review must show "that he has performed the decree, especially as regards "the payment of money, *and that he has paid the costs.*" Nothing will excuse him from this duty but evidence of his inability to perform it. "This appears to be a settled "rule, laid down both in the ancient and the modern "books; but the petitioners have paid no attention to this "rule, for there is no offer to perform any part of the "decree, or even to bring the money into court, or any "pretext of poverty, want of assets, or other inability to "do it. There is wisdom in the establishment of such a "provision, and it ought to be duly enforced. Its object "is to prevent abuse in the administration of justice, by "filing bills of review for delay and vexation, or otherwise "protracting the litigation, to the discouragement and distress of the adverse party."

Wiser v. Blachly et al., 2 Johns. Chy., 488.

"If the decree be for the payment of money, the party "must pay it, or give security, although it should afterwards be ordered to be refunded."

2 Barb. Chan. Prac., 96 (1st ed).

After decree for payment of money, the money must be paid before a bill of review can be brought.

Bp. of Durham v. Liddell, 2 Bro. P. C., 63.

And the precise and only way to insist upon this objection was by such a motion as was made, since a demurrer merely would, it seems, admit that the bill was properly in court, and only the objection would be left that it showed no ground for relief. "The performance of the decree is not "necessary to the jurisdiction of the court, but was merely "a personal right," which right, if insisted on, must be urged at a proper time, viz., by a motion to dismiss the bill of review, and not by a demurrer.

Griggs et al. v. Gear, 3 Gilm., 17.

In that case, the bill of review was of a character which did not require the consent of the court before it was filed (*see p. 16 of the Report*); yet the Supreme Court of Illinois reversed a decree sustaining a demurrer to the bill on the ground that a motion to dismiss the bill was the proper way to bring before the court the precise objection here urged, and that the objection was waived when urged by demurrer instead of by motion to dismiss.

It was in view of the Illinois cases that a motion was made to dismiss the bill, instead of raising the point by demurrer.

In *Horner* v. *Zimmerman et al.*, 45 Ill., 14, a decree had been rendered in a proceeding for the foreclosure of a mortgage, finding the amount due, ordering its payment within a certain number of days, and decreeing, that in default of such payment, the mortgaged premises be sold. Afterwards a bill of review was filed by some of the defendants in the original suit, who were affected by the decree. To this bill of review answers were filed. Upon the hearing the decree complained of in the bill of review was set aside. In the Supreme Court, on appeal, the point was made, that as the bill of review did not deny the justice of the demand established by the decree sought to be reviewed, the complainants in that bill should have alleged that they had paid it, together with the costs of the original suit: or, at least, have given a sufficient reason for not having done so. The court said:

“ This we understand to be the settled doctrine of
“ bills of review, as will be found in all the elementary
“ treatises on the subject. *Lube Eq. Pl., 179: 2 Daniel's*
“ *Ch. Prac., 1626, et seq.:* *Griggs* v. *Gear*, 3 Gilm., 11.
“ *But to avail of this, the appellant should have made his*
“ *motion in the court below not to receive the bill*, but he
“ answered the bill, and went to a hearing on the merits,
“ and cannot now make the objection that neither the
“ mortgage money or costs were paid before or at the
“ time of filing the bill, if the fact was so, of which we
“ are not informed by the record. Appellant has treated
“ it as a bill properly filed, and he must be bound by it.”

And again, in the late case of *Forman* v. *Stickney et al.*, 77 Illinois, 575, it was so held. In that case a defendant to an amended bill of review did move to strike it from the files, on the ground that it failed to show a compliance with the original decree, or the payment of costs, or to show any reason for such omission of compliance. But because he had previously demurred to the bill of review before it was amended, the court said he thereby admitted the bill was properly in court, and could not afterwards raise the objection that the bill was not properly filed because of non-performance of the original decree. From these Illinois cases it is quite apparent that the only safe course to be parsued by the complainant in the original bill, was to move to dismiss the bill of review, since he could neither demur nor answer without waiving an important and substantial right.

The decree had not been performed in three important particulars, viz: The amount adjudged to the complainant had not been paid; possession of the mortgaged premises had not been surrendered to him; and the costs of the proceedings had not been paid to him, he having advanced them, as part of his bid, to the master.

No pretense is made that the first requirement of the decree had been complied with; and yet it constituted a judgment against the mortgagor for the large sum of $66,458.87, and interest. (Printed Record, 13.)

The mortgage lien was not exhausted by a sale of the premises; and upon bill to redeem, the appellant would have been required to tender and pay not merely the sum for which they were sold, but the whole sum actually due on the mortgage.

Bradley v. *Snyder*, 14 Ill., 263.
Collins v. *Riggs*, 14 Wall., 491.
2 Jones on Mortgages, Sec. 1075.

Availing himself of his statutory right of redemption, the appellant, within fifteen months after the sale (or at least within twelve months, if he is to be treated as standing in the shoes of the mortgagor), might have redeemed from the sale by paying the amount of Flint's bid, with ten per cent. interest. This he did not elect to do, and when he attempts to assail the decree by demanding the equitable interference of the court, it must be upon terms of performance, *i. e.*, the same terms required of one who seeks redemption by bill in equity.

In the cases cited above, it is considered proper, as applied to attempts to redeem from judicial sales, that when one appeals to a court of equity for the enforcement of a right, he should be put upon equitable terms before being allowed to exercise it. In other words, he must himself do that which is equitable as a condition precedent to his standing in court.

The same rule is recognized in

Lloyd v. *Karnes*, 45 Ill., 68.

In this view, it is wholly immaterial that the premises sold for less than the mortgage debt. In his election of remedies the appellant chose one requiring him to perform the decree—to pay the debt and costs—and this he has never done, or offered to do.

Nor is his position any better, if it be admitted that he might have redeemed by paying the amount of the bid at the sale, with interest. He has not offered to do that.

Nor has he offered to pay the deficiency judgment of $29,843.45. (Printed Record, 15.)

Nor has he offered security for any of these things.

It is true that the complainant in the original bill was granted permission to prove up the deficiency against the estate of the mortgagor in bankruptcy (Printed Record, 15), but this was in the supplementary order confirming the sale, and not in the decree subject to review. In any event it does not relieve the appellant from the necessity of performance of the decree itself in every material respect, before he could equitably claim a right to be heard upon his bill of review.

But it is pretended that the appellant did perform so much of the decree as required a surrender of the mortgaged premises to the purchaser at the sale.

The utmost that is averred by the appellant on this score in his bill as amended is that, at the time of the entry of the decree, one John Brems was in possession as the tenant of the mortgagor and mortgagee, who were owners in common; that Brems has continued in possession, and has, prior to the filing of the bill of review, accounted for the rent to Newbury as Flint's agent; from which he states, as a legal conclusion merely, that Flint has assumed and entered upon the possession of the premises. The mortgages were upon the undivided half of these premises, Flint being the owner of the other undivided half. (Printed Record, 16.) Construing the pleading most strongly against the pleader, as is the rule, it contains no hint or suggestion that the tenant had attorned to Flint by appellant's authority, or that he had even paid any rent to Flint's agent, or otherwise recognized Flint as his landlord, with reference to Kreigh's undivided half of the premises. From this averment of fact the legal conclusion is "a lame and impotent" one.

There is no pretense that the costs of the foreclosure proceeding have been paid other than by Flint himself.

We append the opinion of Judge BLODGETT, delivered upon the dismissal of the appellant's bill. It will also be found reported in full in Vol. 12 Chicago Legal News, p. 112.

E. B. McCAGG, AND
W. I. CULVER,

Counsel for Appellee, James L. Flint, Executor, &c.

CHICAGO, Dec. 12, 1881.

APPENDIX.

BLODGETT, J. This is a bill of review for errors on the face of the record, filed by the complainant, as assignee of David Kreigh, a bankrupt, charging in substance, that on the 31st day of March, 1877, said Flint exhibited in this court his original bill of complaint, for the foreclosure of a mortgage before that time given by said David Kreigh, and held by the complainant in said original bill. That complainant in this cause was made a party defendant to said bill, and that such proceedings were had in said cause, that on the 19th day of October, 1877, a decree for the foreclosure of said mortgage was entered in said cause, whereby it was "adjudged and decreed that said defendant, "David Kreigh, or some of the other defendants "in said cause, pay, or cause to be paid, to the complainant, within one hundred days from the date of the entry "of this decree, the sum of $66,458.87, with interest "thereon at the rate of six per cent, per annum, from the "25th day of July, 1877, (the date of the Master's report "finding the amount due on said mortgage) to the day of "such payment; and also, pay into court the costs in this "cause to be taxed; and in default of doing so, that all and "singular the premises mentioned and described in the "said bill of complaint, or so much thereof as may be sufficient to satisfy the amount due the complainant as hereinbefore adjudged, together with interest and costs in "this case, and which may be sold separately, without "material injury to the parties interested, be sold at public auction, by or under the direction of the said Henry W.

"Bishop, the Master in Chancery of this court * * *
"and that said Master make such sale in accordance with
"the course and practice of this court."

That afterwards, said Master reported to the court that he had sold said premises in accordance with said decree, and that the said Flint had become the purchaser thereof. And on the 13th day of March, 1878, the report of said Master was ratified and confirmed by the court, and it was "further ordered and adjudged and decreed by the "court that the said Master execute and deliver to "Thompson J. S. Flint, the purchaser named in said report of sale, a deed conveying the said premises, and all "right and title, legal or equitable of the said defendants "therein, so by the said Master sold to him, as in said report "mentioned." And it was further by said order "adjudged "and decreed that said defendants and all persons claiming "or to claim from, through, or under them, or any of them, "from and after the commencement of this suit, and all "persons having a lien subsequent to the mortgage mentioned in the bill of complaint in this cause, either by "judgment or decree or otherwise, upon the premises described in said mortgage, and his and their heirs and "personal representatives, and all persons having any "lien or claim by, from, through, or under such subsequent judgment or decree, and their heirs and personal "representatives, and all persons claiming under them, be "forever barred and foreclosed of and from all equity of "redemption and other claims, legal or equitable, of, in "and to said premises, and every part and parcel thereof." * * * * * And that "said purchaser "of said premises be let into possession thereof." It also appears from said order, that after paying from the proceeds of said sale, the costs in said cause and applying the balance of said proceeds upon said decree, there remained due to complainant on said mortgage debt, the sum of $29,843.45, for which said David Kreigh was personally liable, and which complainant had leave to prove against the estate of said Kreigh in bankruptcy.

The errors assigned are:

1st. That the decree of October 19, 1877, orders the absolute sale of the mortgaged premises, without providing for or giving time for redemption, contrary to the statute of the State of Illinois concerning sales of real estate under execution or decrees of court.

2d. That the order of March 13, 1878, confirming and ratifying the Master's sale, made no provision for the redemption of said land from said sale, but directed the Master to make an absolute deed of said premises to the purchaser at said sale, and ordered that this complainant, and all other defendants in the original suit, be forever foreclosed and barred from all right and equity of redemption in said land, contrary to the statute of Illinois providing for the redemption of lands sold under executions and decrees.

And for these errors this complainant now prays that said decrees and orders in said foreclosure suit may be "reviewed, reversed and set aside," and no further proceedings had thereunder; and that all proceedings already had thereunder be avoided and set aside; that any and all deeds made under and by virtue of said decrees or orders be set aside, annulled and declared void; and that this complainant be put in his first and former position as to said property, with the same rights therein as before the entering of said orders and decrees.

The defendant Flint has interposed a motion to dismiss this bill, and complainant's counsel has requested that in considering said motion the court pass upon the equity of the bill.

The motion to dismiss is urged, for the reason that the complainant in this bill has not averred a performance of the decree.

By one of the ordinances of LORD BACON, which still governs as to bills of review, "The decree must be per-"formed before a bill of review can be brought. If the "decree be for land, the possession of it must be sur-"rendered; if it be for money, the money must be paid:" 5 Russ., 233; *Partridge* v. *Usborne; Wiser* v. *Blachly*, 2 Johnson Ch., 488; 2nd Barbour Chan. Prac., 96; *Griggs* v. *Gear*, 3 Gil., 17.

The authorities all sustain these propositions that performance of the decree is a pre-requisite condition to the right to bring a bill of review, and that for a failure to show performance, a motion to dismiss will be sustained.

It will be noticed that the original decree which this complainant seeks to have reviewed and reversed, required that Kreigh, the mortgagor and principal defendant, or some other of the defendants should, within one hundred days, pay the mortgage debt, ($66,458.87) with interest and costs, and that in default of so doing, the mortgaged premises be sold. The record also shows that a sale of the mortgaged premises was made in accordance with the decree, and that by such sale the costs and part of the mortgage debt were satisfied, and a decree made allowing complainant to prove the deficiency against the estate of Kreigh in bankruptcy. This decree being in the alternative—that is, for the payment of the mortgage debt and sale in default of payment—I am of opinion that the sale of the property may be considered a performance to the extent of the satisfaction obtained; and as no personal decree on which execution can be issued, was made against defendant Kreigh or his assignee. I am of opinion that the record shows a substantial performance of the decree except as to the possession of the premises. It does not appear from the bill of review that the purchaser has been let into possession under his deed, and I am of the opinion that a full performance of the decree would require that the purchaser be put in possession, either by the voluntary act of the defendant, or by a writ of assistance from the court in aid of its decree.

If the defendant, Kreigh, had not been in bankruptcy, and a personal decree had been entered against him for the deficiency, it might be that he or his assignee must show payment of the deficiency in order to sustain a bill of review; but that question does not arise, as this record shows that before the foreclosure D. Kreigh had become bankrupt, and the complainant had been elected his assignee.

If I was disposed to decide this case upon the technical question as to whether a performance of the decree was shown by the bill or not, I think I should be compelled to hold that the cause should be dismissed for the failure to show such fact; but I prefer to place my decision upon broader ground, going to the equity of the case as made by the bill and record.

The complainant assumes that it was error in this court to decree an absolute sale of the mortgaged premises without expressly giving to the defendants, by the terms of the decree, a right to redeem the mortgaged premises from the sale, in accordance with the statute of Illinois on that subject. And *Brine* v. *Ins. Co.*, 96 U. S., 627, and *Orvis* v. *Powell*, 98 U. S., 176, are cited in support of this position: and the language used by the court in these cases would seem to justify their citation as controlling authority. It must be borne in mind, however, that in both these cases the court is assuming to protect or enforce a right given by our State statute, holding that the statute, prescribing the right and period of redemption, entered into and became a part of the mortgage contract, and that this court could not, by its decree, deprive the parties entitled thereto of their statutory right of redemption, saying, however, in the Brine case: "It is not "necessary that the form or mode of securing a right like "this should follow precisely that prescribed by the "statute. If the right is substantially preserved or "secured, it may be done by such suitable methods as "the flexibility of chancery proceedings will enable the "court to adopt." At the time these two cases were decided, no express decision had been made by the Supreme Court of this State, defining the right of a party to redeem when provision had not been made for it in the decree: but since those decisions the opinion of the Supreme Court of this State in *Suitterlin* v. *The Connecticut Mutual Ins. Co.*, 90 Illinois, 483, has been promulgated. This was a bill filed by Suitterlin, complainant, on the 28th of July, 1878, in the Circuit Court of Cook County, against the Conn. Mut. Ins. Co., alleging that the said company, in July, 1874, had filed its bill in this court to foreclose two mortgages upon certain lands; that such proceedings were had in said cause, that on the 8th day of March, 1875, a decree of foreclosure was rendered in said cause, whereby, according to the course and practice of this court, said lands were ordered to be sold without redemption: that said premises were so sold by the Master in Chancery of this court, pursuant to said decree, on the 10th day of May, 1876, to said company; and on the 31st day of May, 1876, said sale was confirmed, and the master directed to make a deed thereof to said purchaser, and decreeing that the mortgagor be forever barred and foreclosed from all right and equity of redemption in said premises; that the purchaser be let into possession; and awarded a personal decree against the complainant, Suitterlin, for over $6,000 deficiency; and that said master on the 16th day of June, 1876, executed to said company a deed of said premises.

The bill further charged that the course and practice of this court to sell lands under decrees of foreclosure, without allowing a right of redemption, was contrary to the Statute of the State of Illinois; that the court had no power or jurisdiction to make a sale in that manner, and that said sale was void, and that Suitterlin, the mortgagor, was entitled to make payment of said mortgage, and relieve the premises of the lien thereon, which he offered to do. The record of this court in said foreclosure suit was pleaded in bar to Suitterlin's bill. That by the laws of the United States the time for prosecuting appeals and writs of error is limited to two years; that more than two years had elapsed since said decree, and no appeal or writ of error had been prosecuted from said foreclosure decree. This plea having been set down for argument, was held good by the Circuit Court, and the bill dismissed for want of equity. From the Circuit Court the cause was taken by appeal to the Appellate Court, where the decree of the Circuit Court was affirmed, and an appeal taken to the Supreme Court of this State, where the decree of the lower court was affirmed.

It was there contended as in this case, that this court in directing an absolute sale of the mortgaged premises had exceeded its power, and that so much of the decree as directed a sale without redemption was erroneous and void.

In answer to this position, the Supreme Court says:

“ Without attempting to pass upon the question whether
“ the decree of the United States Court, in so far as it
“ ordered an absolute sale of the mortgaged premises
“ without allowing the statutory right of redemption, was
“ in excess of its jurisdiction and void, so that the mort-
“ gagor, notwithstanding the decree and the master's deed,
“ might within the year allowed him by the statute for
“ redemption, have paid or tendered the redemption
“ money, and redeemed the land, or have been entitled to
“ file a bill for redemption, we will assume, for the pur-
“ poses of the present decision, that that portion of the
“ decree excluding redemption was void, and it is not then
“ apparent that this bill can be maintained. Such portion
“ of the decree being held void, need not invalidate the
“ residue of the decree, or make null all the subsequent
“ proceedings in execution of the decree.”

“ The decree here finding the amount due was good, and
“ also the order of sale, if the amount was not paid within
“ a hundred days, the defect was in adding to the order of
“ sale, that it should be without redemption.”

“ Hold that additional portion of the order of sale to be
“ void, then it is null, as if it were not, and the simple order
“ of sale stands, which has been executed, and a deed
“ given. The statute gave to the mortgagee the
“ right of redemption, and he might have exercised
“ it. It is not the decree that gives the right to
“ redeem. The mortgagee does not depend upon
“ that for the right, but upon the statute. We appre-
“ hend that in a decree of foreclosure, a mere order of sale

“ would be sufficient, saying nothing about redemption.
“ That the right of redemption would not be interfered with
“ under such an order, but would exist in full force by
“ virtue of the statute, and that it should be the duty of the
“ officer in the execution of the order of sale to follow the
“ directions of the statute. But suppose he should not do so,
“ and upon sale made, instead of giving a certificate of the
“ sale, and that the purchaser would be entitled to a deed
“ at the end of fifteen months, if the premises should not be
“ redeemed as the statute directs, he should do as was done
“ in the present case, execute a deed at once. We think
“ that would not defeat redemption, nor give right of pres-
“ ent possession, at least in equity, but that the statute
“ would control, and the right of redemption and of present
“ possession remain by virtue of the statute, and that the
“ deed would remain inoperative in effect, until the expira-
“ tion of the period for redemption. The decree here has
“ been executed, the sale made and deed given. The wrong-
“ ful circumstance was, the making of the deed at the time
“ of the sale, instead of deferring its execution until fifteen
“ months afterwards. The deed was prematurely made;
“ but if it be held as not affecting any right of the debtor in
“ consequence thereof, why may it not stand and remain as
“ an operative deed after the expiration of the period of
“ redemption, where no attempt had been made to assert
“ the right of redemption?”

“ It is not perceived what legal harm can have resulted
“ to appellant from the decree being in its present form in-
“ stead of with redemption.”

“ If erroneous only in so far as it did not allow the statu-
“ tory right of redemption, then, on the settled rule, it could
“ not be questioned collaterally. If void, then we do not
“ regard that it was an obstruction to the exercise of the

"right of redemption given by the statute, and it is only as "affecting the exercise of such right of redemption, that "there can be substantial cause of complaint. As affecting "the sale of the premises, it would seem that one without "redemption would be calculated to insure a better price "for the property sold than a sale subject to redemption. "Had all been in regular form, and a certificate of pur- "chase only given on the sale, the purchaser would have "now been entitled to a deed, there having been no effort "for the exercise of the right of redemption. Now, having "the deed, notwithstanding it was prematurely executed, "we think the purchaser may hold it, there not appearing "to be any equitable ground for the interposition of a court "of equity to set it aside, and allow redemption now. We "are of opinion that there is no equitable title to relief shown, "and that the Circuit Court did right in holding the plea "good, and dismissing the bill."

It seems to me to follow inevitably from the reasoning of the Illinois Supreme Court, that the complainant in this case was not deprived by the decree which he now seeks to have reviewed and reversed, of the right of redemption given by the statute of Illinois, and therefore, that the error assigned in the bill under consideration worked no injury to this complainant. By reference to dates it will be seen, that within a very few months after the entry of the decree now complained of, and long before the expiration of twelve months after the sale under that decree, the Supreme Court of the United States rendered its opinion in the Brine case, deciding, in effect, that this court could not deprive a mortgagor of his statutory right of redemption from a sale under decree of foreclosure; and the practice of this court was, without delay, adapted to that decision, and specific rules entered of record prescribing the method by which redemptions could be made. It is therefore to be presumed, that if this complainant had, within the twelve months allowed him for that purpose, brought into court the money required to make a redemption under the statute, the court, in the exercise of its equity powers, would have allowed the redemption, either upon petition or by a supplemental bill in the nature of a bill of review.

At most, the error in the decree complained of was only an error of form. The complainant does not deny the justice of the demand established by the decree, but simply claims that the court did not specifically reserve to him the statutory right of redemption from the sale; but the failure to do this did not deprive the complainant of his rights, and worked him no substantial injury. And bills of review will not be entertained for errors of form merely: Story's Eq. Pldgs., 411. Having allowed his statutory time for redemption to expire without an offer or effort to redeem, the complainant's bill of review appears to me to be without equity. He comes too late to ask the court to correct the error assigned; and, therefore, although there may have been a technical error in the foreclosure decree, it deprived the complainant of no rights.

Bills of review for newly discovered evidence can only be filed by leave of court, for the reason that the court must look into the newly discovered evidence and determine whether an equitable case for review is made out; and while no leave of court is required to file a bill of review for errors on the face of the record, yet if the court on an examination of the record can see that the complainant upon the showing made, is not entitled to a decree for relief, the bill should be dismissed.

It was suggested on argument, that the Suitterlin case was a bill to redeem, while this is a bill of review; but to my mind the distinction between the two actions is one of form merely. The leading principle established by the Suitterlin case is, that the statutory right of redemption cannot be denied or taken away by the neglect of the court to recognize it in the decree, nor by a denial of such right in express terms. And it seems to me that if this case had been before the Supreme Court of the United States, when *Brine* v. *Insurance Co.* and *Orvis* v. *Powell* were under consideration, it is at least extremely doubtful if that court would have reversed either of those cases for error, it being a well established rule of the Supreme Court of the United States that it will follow that construction of State statutes which has been adopted by the Supreme Court of the State enacting the statute. *Townsend* v. *Todd*, 91 U. S., 452; *Elmwood* v. *Marcy*, 92 U. S., 289.

If, therefore, the Supreme Court of the United States had been advised that the Supreme Court of this State in a case precisely like the Brine case upon the question at issue had said: "It is not perceived what legal harm "can have resulted to the appellant from the decree being "in its present form instead of with redemption," it would hardly have deemed the error assigned in the Brine case grave or vital enough to require a reversal of the decree.

The motion to dismiss is therefore sustained, because I think the matters alleged in the bill do not and should not entitle the complainant to any relief.

S

15–249

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 246.

ALBERT SCHEFFER, GEORGE R. FINCH, AND CHARLES N. NELSON, EXECUTORS OF CHARLES SCHEFFER, DECEASED, PLAINTIFFS IN ERROR,

VS.

THE WASHINGTON CITY, VIRGINIA MIDLAND & GREAT SOUTHERN RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED SEPTEMBER 17, 1879.

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1 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

In the circuit court of the United States for the eastern district of Virginia.

ALBERT SCHEFFER, GEORGE R. FINCH, AND Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, plaintiffs,
vs.
THE WASHINGTON CITY, VIRGINIA MIDLAND and Great Southern Railroad Company, defendant.

Be it remembered that on this day, to wit, the 4th day of August, 1876, came the plaintiffs, by their attorneys, and sued out of the clerk's office of the circuit court of the United States for the eastern district of Virginia a summons, which summons, with the endorsements and return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, eastern district of Virginia, ss.

The President of the United States of America to the marshal of the eastern district of Virginia, greeting:

2 We command you that you summon the Washington City, Virginia Midland and Great Southern Railroad Company, if it shall be found in your district, to be and appear at the clerk's office of our circuit court of the United States for the eastern district of Virginia, at rules to be holden at the said clerk's office, in the customhouse in the city of Richmond, in the district aforesaid, on the first Monday of September next, to answer unto Albert Scheffer, George R. Finch, and Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, in a plea of trespass on the case, to their damage, as they allege, of ten thousand dollars; and have you then and there this writ.

Witness the Hon. M. R. Waite, Chief Justice of the Supreme Court of the United States of America, at Richmond, this 4th day of August, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 101 year.

[SEAL.] M. F. PLEASANTS, *Clerk.*

Executed this eighth day of August, 1876, by delivering to
3 John S. Barber, president of the Washington City, Virginia Mid-
land and Great Southern Railroad Company, in person, a true
copy of this writ.

C. P. RAMSDELL,
U. S. Marshal,
By I. C. O'NEAL,
Deputy Marshal.

(Summons endorsed:) No. 1301. Circuit court of the United States, eastern district of Virginia. Charles Scheffer's executors vs. The Washington City, Virginia Midland and Great Southern Railroad Company. Returnable at rules on the first Monday of September, 1876. M. F. Pleasants, clerk. Sanborn and King, attorneys for plaintiffs.

And at another day, to wit, at rules held in the clerk's office of said circuit court on the first Monday of September, 1876, the plaintiffs failing to appear, this cause is continued until the next rules.

And at another day, to wit, at rules held in the clerk's office of said circuit court on the first Monday of October, 1876, the plaintiffs still failing to appear, this cause is continued until the next rules.

4 And at another day, to wit, at rules, held in the clerk's office
of said circuit court on the first Monday of November, 1876, came
the plaintiffs and filed their declaration, which declaration, with the
exhibit therewith and the endorsements thereon, are in the words and
figures following, to wit:

Declaration.

EASTERN DISTRICT OF VIRGINIA:

Albert Scheffer, George R. Finch, and Charles N. Nelson, executors
of the last will and testament of Charles Scheffer, deceased, complain
of the Washington City, Virginia Midland and Great Southern Railroad
Company, in a plea of trespass on the case, for that whereas
the plaintiffs above named and each of them is a resident and citizen
of the State of Minnesota, and the defendant above named is, and for
more than two years last past has been, a corporation organized, existing,
and doing business under the laws of the State of Virginia,
located in and a resident and citizen of the said State of Virginia, and
the plaintiffs above named and each of them is a duly-appointed,
qualified, and acting executor of the last will and testament of Charles
Scheffer, late of Minnesota, deceased, as by the letters testamentary,
5 duly certified copies of which are produced and filed
herewith, more fully appear; and that at the time of the committing
of the grievances hereinafter mentioned the defendant was the
owner of and proprietor of a certain line of railroad, with the tracks,
engines, cars, and other materials connected therewith, for the carriage
and conveyance of passengers from Lynchburgh and other points in
the State of Virginia to Alexandria and other points in said State, and
to Washington, in the District of Columbia, for hire and reward to said
defendant in that behalf, to wit, at Alexandria aforesaid; and the said
defendant being such carrier and proprietor of the said railroad, cars,
engines, and other materials as aforesaid, thereupon, heretofore, to wit,
on the 6th day of December, A. D. 1874, to wit, at Alexandria aforesaid,
the said Charles Scheffer, deceased, at the special instance and
request of the defendant, became and was a sleeping-car passenger
upon a train of cars of said defendant, to be safely and securely carried
and conveyed thereby on a certain journey, to wit, from Lynchburgh,
Virginia, to Alexandria, Virginia, and Washington, District of
6 Columbia, aforesaid, for a certain fare and reward to the said
defendant in that behalf; and the said defendant then and there
received the said Charles Scheffer, then alive and in good health, and
thereupon said defendant then and there became bound and it was
the duty of said defendant to use due and proper care that the said

Charles Scheffer should be safely and securely carried and conveyed
by, upon, and in said sleeping-car and train on the said journey from
Lynchburg aforesaid to Alexandria and Washington aforesaid. Yet,
the said defendant, not regarding its duty in that behalf, did not use
due and proper care that the said Charles Scheffer, deceased, should
be safely and securely carried and conveyed by and upon said railroad
sleeping-car and train on the said journey from Lynchburgh aforesaid to
Alexandria and Washington aforesaid, but wholly neglected so to do, and
negligently and carelessly suffered and permitted said train and said
sleeping-car on which said Charles Scheffer was by said defendant being
transported, carried, and conveyed as aforesaid, the same being attached
to the said train and transported therewith as the rear car thereof,
7 and while said Scheffer was asleep therein, to stand stationary
upon said railroad, and the track thereof, at an unusual place
and time, to wit, at two o'clock a. m., and away from any station,
but not far distant from Rapidan Station, on said railroad, and in
the night-time, at a period of great darkness, and in a position where
said train and sleeping-car could not be seen by the agents, servants,
and employees of the defendant employed upon other and approaching
trains, and without sending or causing to be sent any lights, flags,
signals, or signs of danger of any description to the rear to warn the
agent, servants, and employees of the defendants engaged upon approaching trains, and while said defendant was running and transporting
various other engines, cars, and trains with great force and speed upon
the same railroad track, and in the same direction as the engine, train,
and sleeping-car upon and by which said defendant undertook to carry and
was conveying the said Charles Scheffer, and which was standing stationary upon said railroad track as aforesaid, whereby the defendant then and
there, to wit, on the 7th day of December, A. D. 1874, carelessly,
8 negligently, and unskillfully ran one of its engines attached to
a heavy train with great force and violence into and through
the said sleeping-car in, by, and upon which it had agreed safely to transport and convey, and was engaged in transporting and conveying,
said Charles Scheffer from Lynchburgh aforesaid to Alexandria and
Washington aforesaid, and before the arrival of said sleeping-car at
Alexandria aforesaid, to wit, on the 7th day of December, 1874, and
whereby said sleeping-car was rent, broken, torn, and shattered, and
by means whereof the said Charles Scheffer was cut, bruised, maimed,
and disfigured, wounded, lamed, and injured about his head, face,
neck, back, and spine, and by reason whereof the said Charles
Scheffer became and was sick, sore, lame, and disordered in mind
and body, and in his brain and spine, and by means whereof phantasms, illusions, and forebodings of unindurable evils to come upon him
the said Charles Scheffer were produced and caused upon the brain and
mind of him the said Charles Scheffer, which disease so produced
as aforesaid baffled all medical skill, and continued constantly
9 to disturb, harrass, annoy, and prostrate the nervous system
of him the said Charles Scheffer, to wit, from the seventh day of
December, A. D. 1874, to the eighth day of August, 1875, when said
phantasms, illusions, and forebodings produced as aforesaid overcame
and prostrated all his reasoning powers, and induced him the said
Charles Scheffer to take his life in an effort to avoid said phantasms,
illusions, and forebodings, which he then and there did, whereby and
by means of the careless, unskilful, and negligent acts of the said defendant aforesaid the said Charles Scheffer, to wit, on the eighth day
of August, 1875, lost his life and died, leaving him surviving a wife

and four minor children by a former wife, deceased, to the damage of the plaintiffs, as they say, in the sum of ten thousand dollars; and whereby and by means of the premises an action has accrued to these plaintiffs to have and recover said sum of ten thousand dollars from the defendant; that therefore they bring this suit.

CHARLES KING,
Attorney & Solicitor for Plaintiffs.

10 Charles King, being first duly sworn, deposes and says that he is the attorney for plaintiffs in this cause, and has read the foregoing declaration of plaintiffs therein, and that the same is true of his own knowledge, except as to matters therein stated on his information and belief, and that as to those matters he verily believes the same to be true.

CHARLES KING.

Subscribed and sworn to this 6th day of November, 1876.

M. F. PLEASANTS, *Clerk.*

(Declaration endorsed:) No. 1301. United States circuit court, fourth circuit, eastern district of Virginia. Albert Scheffer et al., administrators, &c., vs. The Washington City, Virginia Midland and Great Southern R. R. Co. Declaration. Filed 6th November, 1876. M. F. Pleasants, clerk. Charles King, att'y for plaintiffs.

11 *Exhibit with declaration.*

LETTERS TESTAMENTARY.

THE STATE OF MINNESOTA,
County of Ramsey, ss:

The State of Minnesota to all to whom these presents shall come or may concern, and especially to Albert Scheffer, George R. Finch, and Charles N. Nelson, of the county of Ramsey and State of Minnesota, greeting:

Know ye that whereas Charles Scheffer, late of the county of Ramsay and State of Minnesota, lately died testate, and being at the time of his decease an inhabitant of said county, by means whereof the proving and recording his last will and testament, and granting administration of all and singular the goods, chattels, rights, credits, and estate whereof he died possessed, and also the auditing, allowing, and finally discharging the account thereof, is within the jurisdiction of the probate court of said county of Ramsey;

And whereas, on the 27th day of September, A. D. 1875, at the city of St. Paul, in said county, before the Hon. Oscar Stephenson, probate judge of said county, the last will and testament of the said
12 Charles Scheffer (a copy whereof is hereunto annexed) was proved, allowed, and admitted to probate; and whereas Albert Scheffer, George R. Finch, and Charles N. Nelson, executors named and appointed in and by said last will and testament, have given bond as required by law for the faithful execution of said trust, which said bond has been approved by said judge and filed in the aforesaid probate court:

We, therefore, reposing full confidence in your integrity and ability, have granted and by these presents do grant the administration of all and singular the goods, chattels, rights, credits, and estate of the said deceased, and any way concerning his said last will and testament, unto you, the said Albert Scheffer, George R. Finch, and Charles N. Nelson, executors aforesaid; hereby authorizing and empowering you to take and have possession of all the real and personal estate of said deceased, and to receive the rents, issues, and profits thereof, until said estate shall have been settled or until delivered over by order of said court to the heirs or devisees of said deceased; and to demand, 13 collect, recover, and receive all and singular the debts, claims, demands, rights, and choses in action which to the said deceased while living and at the time of his death did belong; and requiring you to keep in good tenantable repair all houses, buildings, and fences on said real estate which may and shall be under your control; and, in accordance with your bond approved and filed as aforesaid, to make and return into the probate court of said county of Ramsey, within three months, a true and perfect inventory of all the goods, chattels, rights, credits, and estate of the said deceased which shall come to your possession or knowledge, or to the possession of any other person for you; to administer, according to law and to said last will and testament, all the goods, chattels, rights, credits, and estate of the said deceased which shall at any time come to your possession or to the possession of any other person for you, and out of the same to pay and discharge all debts, legacies, and charges chargeable on the same, or such dividends thereon as shall be ordered and decreed by said 14 court; to render a just and true account of your administration to said court within one year, and at any other time when required by said court, and to perform all orders and decrees of said court by you to be performed in the premises.

In testimony whereof we have caused the seal of our probate court to be hereunto affixed. Witness the Hon. Oscar Stephenson, judge of probate, at the city of St. Paul, in said county, this 27th day of September, A. D. 1875.

[PROBATE COURT SEAL.] OSCAR STEPHENSON,
Judge of Probate Court, County of Ramsey, Minnesota.

(Endorsed:) No. 1437. In probate court, Ramsey County. In the matter of the estate of Charles Scheffer, deceased. Letters testamentary. State of Minnesota, county of Ramsey. I hereby certify that the within letters testamentary were duly recorded this 27th day of September, A. D. 1875, in book 4 of letters testamentary, page 72.

OSCAR STEPHENSON,
Judge of Probate.

STATE OF MINNESOTA,
County of Ramsey, ss:

15 In probate court.

I, Oscar Stephenson, judge of the probate court of said county, do hereby certify that I have compared the annexed copy of the letters testamentary in the matter of the estate of Charles Scheffer, deceased, issued and granted to Albert Scheffer, George R. Finch, and Charles N. Nelson, executors, September 27th, 1875, with the original records preserved in said probate registry, and that the same is a true copy thereof, and of the whole of said original records.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the probate court of said county, at Saint Paul, in said county, this 29th day of July, A. D. 1876.

[PROBATE COURT SEAL.] OSCAR STEPHENSON,
Probate Judge of Ramsey County, Minn.

Certificates of exemplification.

STATE OF MINNESOTA,
County of Ramsey, ss:

In probate court.

16 IN THE MATTER OF THE ESTATE OF
CHARLES SCHEFFER, DECEASED.

Certificate of judge.

STATE OF MINNESOTA,
County of Ramsay, ss:

I, Oscar Stephenson, sole presiding judge of the probate court of Ramsey County, Minnesota, do hereby certify that the foregoing authentication, attestation, and exemplification of the letters testamentary in the matter of the estate of Charles Scheffer, deceased, issued and granted to Albert Scheffer, George R. Finch, and Charles N. Nelson, executors, September 27th, 1875, are in due form of law, and by the proper officer, pursuant to the laws of Minnesota and to the laws of the United States in such case made and provided.

In testimony whereof I have hereunto set my hand and affixed the seal of the said probate court, at the city of Saint Paul, in said county of Ramsey, this 29th day of July, one thousand eight hundred and seventy-six (1876).

[PROBATE COURT SEAL.] OSCAR STEPHENSON,
Judge of Probate Court, Ramsey County, Minn.

17 *Certificate of clerk.*

STATE OF MINNESOTA,
County of Ramsey, ss:

I, Frank Robert, jr., clerk of the probate court of Ramsey County aforesaid, do hereby certify that the Hon. Oscar Stephenson, whose signature appears above, is the sole presiding judge of said court, and that I have compared the foregoing copy of the letters testamentary in the matter of the estate of Charles Scheffer, deceased, issued and granted to Albert Scheffer, George R. Finch, and Charles N. Nelson, executors, September 27th, 1875, with the original files and records thereof in this office, and that I have found the same to be correct copies thereof, and of the whole of such files and records; and I further certify that the exemplification thereof is in due form of law.

In testimony whereof I have hereunto set my hand and affixed the seal of the probate court of said county of Ramsey, at the city of Saint Paul, in said Ramsey County, this 29th day of July, A. D. 1876.

[PROBATE COURT SEAL.] FRANK ROBERT, JR.,
Clerk of the Probate Court.

(Exhibit endorsed:) Filed this 6th day of November, 1876. M. F. Pleasants, clerk.

18 And the defendant failing to appear, it was ordered that judgment be entered for the plaintiffs against the defendant for the damages claimed in the declaration, unless the said defendant should appear and plead to issue at the next rules.

And at another day, to wit, at rules held in the clerk's office of said circuit court on the first Monday in December, 1876, the defendant still failing to appear, on the motion of plaintiffs, by their attorney, it was ordered that the last order made against it in this cause be confirmed, and that the plaintiffs' damages be ascertained by a jury at the then next term.

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Alexandria, in said district, on the second day of January, 1877, this day came the parties, by their attorneys, and the defendant, by leave of court, entered his demurrer to the plaintiffs' declaration, in which demurrer the plaintiffs joined; and this cause is continued.

19 United States circuit court for eastern district of Virginia.

SCHEFFER'S EXECUTORS *vs.* THE WASHINGTON CITY, VIRGINIA Midland and Great Southern Railroad Co.	Trespass on the case. Demurrer.

Demurrer to declaration.

And the said defendant corporation, by its attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against it, the said defendant, and that the said defendant is not bound by law to answer the same, and this it is ready to verify. Wherefore, for want of sufficient declaration in this behalf, the said defendant prays judgment, and that the said plaintiff may be barred from having or maintaining their aforesaid action thereof against it.

LINDEN KENT,
Att'y for Defendant.

20 (Demurrer endorsed:) No. 1301. U. S. circuit court eastern district of Virginia. Scheffer's ex'ors vs. V. M. & G. S. R. R. Co. Demurrer to declaration. Filed January 2d, 1877. M. F. Pleasants, clerk.

Plaintiffs' joinder.

In the circuit court of the United States for the eastern district of Virginia.

ALBERT SCHEFFER, GEORGE R. FINCH, AND Charles N. Nelson, executors of Charles Scheffer, deceased,
vs.
THE WASHINGTON CITY, VIRGINIA MIDLAND and Great Southern Railroad Company.

The plaintiffs say that the declaration is sufficient in law.

CHARLES & GEORGE A. KING,
Attorneys for Plaintiffs.

(Joinder endorsed:) No. 1301. U. S. circuit court E. dist. of Va. Albert Scheffer et al., vs. W. C., V. M. & G. S. R. R. Co. Joinder in demurrer. Filed Jan'y 2nd, 1877. M. F. Pleasants, clerk. Charles & George A. King, att'ys for plaintiffs.

21 And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Alexandria, in said district, on the 10th day of June, 1879.

SCHEFFER'S EX'ORS
vs.
W. C., V. M. & G. S. R. R. Co. } Trespass.

This suit being heard upon the demurrer to the declaration, was argued by counsel, on consideration whereof the court doth sustain said demurrer, with leave to the plaintiffs to file an amended declaration by the 7th day of July, next.

Alexandria, 10th June, 1879.

RO. W. HUGHES, *Judge.*

And at another day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Alexandria, in said district, on the 10th day of July, 1879.

SCHEFFER'S EX'ORS
vs.
W. C., V. M. & G. S. R. R. Co. } Trespass on the case.

The plaintiffs, by their attorneys, having this day filed a memorandum in writing whereby they waive their right to file an amended declaration under leave granted by order entered 10th June, 1879, and it appearing to the court that the declaration does not set forth a
22 cause of action against the defendant, therefore it is considered that the said demurrer to the declaration be sustained, and that the suit be dismissed, and that the defendant recover of the plaintiffs its costs in this behalf expended.

Alexandria, 10th July, 1879.

RO. W. HUGHES, *Judge.*

Memorandum referred to in foregoing decree.

SCHEFFER'S EX'RS
vs
W. C., V. M. & G. S. R. R. Co. } At law.

MEMORANDUM.—The plaintiffs do not desire to amend their declaration, and final judgment may be entered on the demurrer.

Let a writ of error be issued returnable to the next term of the Supreme Court.

CHARLES & GEORGE A. KING,
Attorneys for Plaintiffs.

(Memorandum endorsed:) No. 1301. U. S. circuit court, eastern dist. of Va. Scheffer's ex'rs vs. W. C., V. M. & G. S. R. R. Co. Memorandum. Filed July 10th, 1879. M. F. Pleasants, clerk. Charles and George A. King, att'ys for plaintiffs.

23 *Copy of bond.*

Supreme Court of the United States.

ALBERT SCHEFFER, GEORGE R. FINCH, AND Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, plaintiffs in error,

against

THE WASHINGTON CITY, VIRGINIA MIDLAND and Great Southern Railroad Company, defendants in error.

Know all men by these presents that we, Albert Scheffer, George R. Finch, and Charles N. Nelson, as principals, and William Dawson and E. O. Zimmerman, as sureties, all of the city of Saint Paul, in the State of Minnesota, are held and firmly bound unto the Washington City, Virginia Midland and Great Southern Railroad Company, of the State of Virginia, in the sum of two hundred and fifty dollars, to be paid to the said Washington City, Virginia Midland and Great Southern Railroad Company, or its successors, to which payment well and truly 24 to be made we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, dated this 2d day of September, 1879.

Whereas the above-named Albert Scheffer, George R. Finch, and Charles N. Nelson, being executors of the last will and testament of Charles Scheffer, deceased, have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the eastern district of Virginia: Now, therefore, the condition of this obligation is such that if the above-named Albert Scheffer, George R. Finch, and Charles N. Nelson shall prosecute their said writ of error to effect, and answer all costs if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and virtue.

ALBERT SCHEFFER. [SEAL.]
GEORGE R. FINCH. [SEAL.]
CHAS N. NELSON. [SEAL.]
WILLIAM DAWSON. [SEAL.]
E. O. ZIMMERMAN. [SEAL.]

Signed, sealed, and delivered in presence of—
EDWARD P. SANBORN,
WILLIAM PERTEN.

25 STATE OF MINNESOTA,
County of Ramsey, ss:

Be it remembered that on this 2d day of September, A. D. 1879, personally appeared before me, a notary public in and for said Ramsay County, State of Minnesota, Albert Scheffer, George R. Finch, Charles N. Nelson, William Dawson, and E. O. Zimmerman, to me well known to be the same persons who executed the within instrument, and each of them acknowledged that he executed the same for the uses and purposes therein expressed.

WILLIAM PERTEN,
Notary Public, Minn.

STATE OF MINNESOTA,
County of Ramsey, ss:

William Dawson and E. O. Zimmerman, being each duly sworn, each for himself, deposes and says that he is a resident and freeholder of the State of Minnesota, and worth the amount of five hundred dollars ($500) above his debts and liabilities and his property exempt from execution.

WILLIAM DAWSON.
E. O. ZIMMERMAN.

Subscribed and sworn to before me this 2d day of September, A. D. 1879.

[NOTARIAL SEAL.] WILLIAM PERTEN,
Notary Public, Minn.

26 DISTRICT OF MINNESOTA, *ss:*

I, H. E. Mann, clerk of the U. S. circuit court for said district, do hereby certify that I am personally acquainted with the parties and sureties in the within bond, and that I consider the same perfectly good—both parties and sureties are unquestionable good.

[U. S. CIR. C'T SEAL.] H. E. MANN, *Clerk.*

ST. PAUL, *Sept.* 3d, 1879.

The bond of the plaintiffs in the cause aforesaid is approved.

RO. W. HUGHES,
District Judge for the Eastern Dist. of Va.

(Endorsed:) No. 1301. Albert Scheffer et al. vs. W. C., V. M. & G. S. R. R. Co. Bond to prosecute writ of error. Filed Sept. 8th, 1879. M. F. Pleasants, clerk. John B. Sanborn, Charles King, plaintiffs' attorneys.

Assignment of errors and prayer for reversal.

Supreme Court of the United States.

ALBERT SCHEFFER, GEORGE R. FINCH, AND Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, plaintiffs in error,
27 *against*
THE WASHINGTON CITY, VIRGINIA Midland and Great Southern Railroad Company, defendants in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-nine.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capital in the city of Washington, came the said Albert Scheffer, George R. Finch, and Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, by John B. Sanborn and Charles King, their attorneys, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the demurrer of the defendant to the plaintiffs' declaration was sustained by the said circuit court of the United States for the eastern district of Virginia and judgment given for the defendant, whereas they say that of

28 right and justice and according to the law of the land the said demurrer ought to have been overruled and judgment given for them, the plaintiffs. And the said Albert Scheffer, George R. Finch, and Charles N. Nelson, executors as aforesaid, pray that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that they may be restored to all things which they have lost by occasion of the said judgment.

SANBORN & KING,
Attorneys for Plaintiffs in Error.

(Endorsed:) No. 1301. Scheffer et al. vs. W. C., V. M. & G. S. R. R. Co. Assignment of errors and prayer for reversal. Filed Sept. 8th, 1879. M. F. Pleasants, clerk. John B. Sanborn & Charles King, att'ys for plaintiffs.

29 UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings in the action of Albert Scheffer, George R. Finch, and Charles N. Nelson, executors of the last will and testament of Charles Scheffer, deceased, vs. The Washington City, Virginia Midland and Great Southern Railroad Company, No. 1301 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Alexandria, in said district of Virginia, this 11th day of September, A. D. 1879.

[SEAL.] M. F. PLEASANTS, *Clerk.*

30 UNITED STATES OF AMERICA, *to wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said court before you, between Albert Scheffer, George R. Finch, and Charles N. Nelson, executors of Charles Scheffer, deceased, plaintiffs, and The Washington City, Virginia Midland and Great Southern Railroad Company, defendant, a manifest error hath happened to the great damage of the said plaintiffs, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this tenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.] M. F. PLEASANTS,
Clerk of the Circuit Court of the United States
for the Eastern District of Virginia.

(Indorsed:) No. 1301. United States circuit court, eastern district of Virginia. Albert Scheffer et al. vs. The Washington City, Virginia Midland and Great Southern Railroad Company. Writ of error. To . Filed July 10th, 1879. M. F. Pleasants, clerk.

31 UNITED STATES OF AMERICA, *to wit:*

To the Washington City, Virginia Midland and Great Southern Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden Washington on the second Monday of October next, pursant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Virginia, wherein Albert Scheffer, George R. Finch, and Charles N. Nelson, executors of Charles Scheffer, deceased, are plaintiffs, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiff in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this tenth day of July, in the year of our Lord one thousand eight hundred and seventy-nine.

[SEAL.]

RO. W. HUGHES,
U. S. Dist. Judge.

Service of the within accepted Sept. 8th, 1879.

LINDEN KENT,
Counsel for Defend't.

(Indorsed:) No. 1301. United States circuit court, eastern district of Virginia. Albert Scheffer et al. vs. The Washington City, Virginia Midland & Great Southern Railroad Company. Citation. Filed September 8th, 1879. M. F. Pleasants, clerk.

(Indorsement on cover:) No. 246. Albert Scheffer, George R. Finch, & Charles N. Nelson, ex'ors of Charles Scheffer, dec'd, plaintiff in error, vs. The Washington City, Virginia Midland and Great Southern Railroad Company. E. Virginia C. C. U. S. Filed 17th September, 1879.